85-742

No.

FILED
OCT 31 1985
JOSEPH F. SPANIOL, CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

JEPPESEN & COMPANY,
*Petitioner,*

VS.

BARBARA A. BROCKLESBY, et al.,
and the UNITED STATES OF AMERICA,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: October 31, 1985

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## QUESTION PRESENTED

Does the First Amendment permit a private citizen to be held liable without fault for accurately publishing a law of the United States?

## ADDENDUM TO PARTIES TO THE PROCEEDING

Petitioner's parent, subsidiary and affiliated companies are as follows:

Jeppesen Sanderson, Inc.
The Times Mirror Company
Jeppesen & Co., GMBH

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VS.

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and the UNITED STATES OF AMERICA,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jeppesen & Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 2, 1985.

## PARTIES TO THE PROCEEDING

All parties to the proceedings below remain as petitioner or respondents in this proceeding.

Petitioner is Jeppesen & Company, a publisher of aeronautical charts and maps.

Respondents are plaintiffs Barbara A. Brocklesby, Nancy Evans, Estate of Frank Evans, Norma Lee Mobley Chapman, and World Airways, Inc., and defendant United States of America, with whom petitioner has an ongoing indemnity dispute.

## OPINIONS BELOW

The initial opinion of the Court of Appeals, filed February 15, 1985, has been officially reported at 753 F.2d 794 and appears in Appendix A, hereto. The amended opinion of the Court of Appeals, filed August 2, 1985, has been officially reported at 767 F.2d 1288 and appears in Appendix B, hereto.

## JURISDICTION

Jurisdiction in the District Court was pursuant to 28 U.S.C. §§ 1332(a)(1) and 1346(b). An amended judgment was entered against Jeppesen in the District Court on August 2, 1983 and Jeppesen timely filed its notice of appeal. The opinion of the Court of Appeals for the Ninth Circuit was filed on February 15, 1985. On August 2, 1985, the Court of Appeals denied a timely petition for rehearing en banc and filed an amended opinion. This petition for a writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

## STATEMENT OF THE CASE

In this action, Jeppesen & Company, a publisher of aeronautical charts and maps, was held liable without fault for accurately republishing a government regulation which pilots are required by law to follow.

On September 8, 1973, a World Airways DC-8 cargo aircraft crashed while the crew was attempting to follow an allegedly defective Federal Aviation Administration (FAA) instrument approach procedure which was accurately depicted on a chart published by Jeppesen & Company (Jeppesen). Seven separate actions for property damage and wrongful death were filed against Jeppesen and the United States (Government). These actions were subseqently consolidated for trial.

An instrument approach procedure is designed to ensure a safe descent, under instrument weather conditions, from the enroute phase of flight to a point where a safe landing can be made. All instrument approach procedures for any United States civilian airport are designed by the FAA and incorporated into FAR Part 97 as regulations with the force and effect of law.[1] The FAA was solely responsible for designing and flight testing the instrument approach procedure which World 802 was attempting to follow at the time of the crash.[2] Pilots making an instrument approach to any airport in the United States are required by law to follow one of the standard instrument approach procedures prescribed for that airport by the FAA.[3]

When an instrument approach procedure has been designed by the FAA and reduced to words and numbers on an FAA Form 8260-5, Jeppesen translates the words and numbers into symbols on a map, graphically portraying the approach procedure in a manner easily understood by pilots. Because the approach procedure is a regulation, Jeppesen is required to graphically portray the Government's procedure exactly as designed by the Government.[4] Jeppesen, which has no authority to change or add to the procedure, accurately portrayed the FAA's approach procedure on its chart.[5] As the Court of Appeals observed:

> [T]he Jeppesen chart involved in this case accurately portrayed the instrument approach procedure provided by the Government. All of the defects in the Jeppesen chart stem from the Government's alleged failure to establish a safe instrument approach procedure.

(Appendix B at 9.)

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[1] RT 1858:8-23; FAR §97.20; *Tilley v. United States*, 375 F.2d 678, 680 (4th Cir. 1967). References throughout to "RT" are to Reporter's Transcript and to "CR" are to Clerk's Record.

[2] RT 2483:25-2484:10; 3852:18-22; 1856:11-1859:20.

[3] FAR 91.116(a); RT 1375:16-18; 1376:1-4; 2943:14-2944:4.

[4] RT 2591:10-21; 3852:23-3853:3; 3016:5-3017:1.

[5] RT 3892:1-9; 1859:21-1860:15; 4114:16-4115:6; 5694:11-22.

From the outset of the case, Jeppesen vigorously opposed any attempt to hold it strictly liable for defects in the Government's procedure, as opposed to defects in Jeppesen's depiction of that procedure. In a pre-trial motion, however, the District Court ruled that Jeppesen's chart was a "product" and that Jeppesen could be strictly liable for any defects therein.[6]

The basis for Jeppesen's liability was that the approach procedure itself, as designed by the FAA, was defective. At the end of the two-month liability trial, the court instructed the jury as follows:

> [I]f you find that Jeppesen's instrument approach chart is defective and that the defect was a proximate cause of the accident, you must find Jeppesen liable even if the defect exists only because you find that the FAA designed an approach procedure that you find is itself defective.[7]

The jury returned a liability verdict against Jeppesen and the District Court entered judgment against Jeppesen in the total sum of $12,785,580.81.[8]

On appeal, Jeppesen posed the question: "Can Jeppesen be held strictly liable for accurately publishing a regulation prescribed by the United States Government?" (Appellant's Opening Brief at 1.) Jeppesen argued that "the accurate dissemination of a regulation is protected by the First Amendment." (Appellant's Opening Brief at 39.) Plaintiffs contested this issue and briefed it on the merits. (Brief of Plaintiffs-Appellees at 39-41.)

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[6] CR 305; 311; 349. Labeling Jeppesen's chart a "product" meant that even if the FAA had taken every reasonable precaution to design a safe procedure and reasonably believed it had designed a safe procedure, and even if Jeppesen had taken every reasonable precaution to verify that the FAA had designed a safe procedure and reasonably believed that the FAA had designed a safe procedure, Jeppesen would nonetheless be liable if, upon hindsight, the jury concluded that the procedure as designed was unsafe. *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 434, 143 Cal.Rptr. 225, 573 P.2d 443 (1978).

[7] RT 6233:5-17.

[8] CR 468.

In its Reply Brief, Jeppesen argued that "the First Amendment protects a publisher from liability without fault." (Appellant's Reply Brief at 6.)

On February 15, 1985 the Court of Appeals for the Ninth Circuit filed an opinion affirming the judgment of the District Court. In relevant part, the Court of Appeals held that the First Amendment permitted the regulation of commercial speech to protect the public from false and misleading commercial messages and that liability without fault would have no "significant" chilling effect on freedom of speech. (Appendix A at 13-14.)

Jeppesen timely filed a petition for rehearing in which it observed that the Court of Appeals had overlooked Jeppesen's argument that "no one should be liable for accurately publishing a law." (Petition for Rehearing and Suggestion for Rehearing En Banc at 3.) As part of its suggestion for rehearing en banc, Jeppesen argued:

> *Issue of Exceptional Importance:* The opinion in this case holds that a publisher may be liable without fault for accurately publishing a regulation of the United States. Yet the United States Supreme Court has consistently rejected attempts to impose strict liability on publishers because such liability would have a catastrophically chilling effect on First Amendment freedoms. . . . [¶] . . . Imposing upon a blameless person a choice between financial security through silence and potential financial catastrophe if he speaks the truth leaves freedom of speech not merely chilled, but fast-frozen.

(*Id.* at 7-8.)

On August 2, 1985 the Court of Appeals withdrew its previous disposition, filed an amended opinion and denied Jeppesen's petition for rehearing. Although all parties had briefed the issue on the merits and the Court of Appeals had addressed the issue directly in its original opinion, the amended opinion declined to address the First Amendment issue on the ground that it had not been raised in the District Court. The opinion nonetheless reiterated the Court of Appeals' observation that if Jeppesen wished to

avoid liability, it could "refrain from selling the product." (Appendix B at 14.) The First Amendment issue is properly before this Court. *Hormel v. Helvering,* 312 U.S. 552, 555-59 (1941); *Egan v. Teets,* 251 F.2d 571, 576 (9th Cir. 1957).

Following the Court of Appeals decision on the petition for rehearing, Jeppesen satisfied the judgment, expressly preserving its right to seek review in this Court under the authority of *Cahill v. New York, New Haven & Hartford Railroad Co.,* 351 U.S. 183, 184 (1956); *County of Dakota v. Glidden,* 113 U.S. 222, 224 (1885); *United States of America for the Use of Morgan & Son Earth Moving, Inc. v. Timberland Paving & Construction Co.,* 745 F.2d 595, 598 (9th Cir. 1984), and cases cited therein.

## REASONS FOR GRANTING THE WRIT

For the first time in the history of American jurisprudence a court has held that a commercial publisher may be liable without fault for the accurate publication of a governmental regulation.[9] This decision will limit public access to constitutionally protected information.

### 1. This Court Should Declare That the First Amendment Protects the Accurate Publication of Laws and Government Regulations

The dissemination of laws and regulations is an activity encouraged by the First Amendment.[10] As this Court has stated:

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[9] Jeppesen has previously been held strictly liable for defects in its graphic presentation of information as opposed to defects in the information itself. *See Saloomey v. Jeppesen & Co.,* 707 F.2d 671 (2nd Cir. 1983); *Aetna Cas. & Surety Co. v. Jeppesen & Co.,* 642 F.2d 339 (9th Cir. 1981); *Fluor Corp. v. Jeppesen & Co.,* 2 Civ. 64134 (Cal. 1985), petition pending; *Times Mirror Co. v. Sisk,* 593 P 2d 924 (Ariz. 1978). As the Court of Appeals recognized, these decisions are distinguishable because the Jeppesen chart involved in this case accurately portrayed a defective instrument approach procedure designed by the Government. Appendix B at 9.

[10] The Court of Appeals' determination that Jeppesen's chart is a "product" does not change the fact that Jeppesen's chart is a publication

> The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.

*Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575 (1980).

Unlike cases in which this Court is called upon to determine whether the First Amendment protects expressions which are not clearly speech, or speech which is on the periphery of societal interest, this case involves speech which goes to the heart of a democracy: the dissemination of laws and governmental regulations. This case presents a unique opportunity for the Court to affirm that the First Amendment is not shaped like a donut, protecting the outer boundaries of speech while not protecting speech essential to an informed democracy.

**2. The Decision Below Conflicts with This Court's Decisions Which Hold That the First Amendment Does Not Permit a Publisher of Information to Be Found Liable Without Fault**

This Court has consistently held that a publisher of information may not be liable without fault. *See Gertz v. Welch,* 418 U.S. 323, 340 (1974); *Time v. Hill,* 385 U.S. 374, 387 (1967); *New York Times Company v. Sullivan,* 376 U.S. 254, 278-79 (1964). As the Court explained:

> Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.

*Gertz,* 418 U.S. at 340.

The decision of the Court of Apeals in this matter is in conflict with the principles enunciated by this Court concerning strict

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which communicates laws and government regulations to those who are required to obey them.

liability for publication of information. Jeppesen republished the FAA procedure exactly as prescribed by the FAA, but in a form more easily understood by pilots. The Ninth Circuit held that Jeppesen could be liable without fault, expressly offering Jeppesen the option to "refrain from selling" aviation charts. The Court of Appeals' *express* invitation to self-censorship is so offensive to the First Amendment and to the principles enunciated in *Gertz* that it requires reversal.

### 3. The Decision in This Case Imperils Freedom of Speech by Inhibiting Mass Distribution of Information

The rule adopted by the Court of Appeals in this case has consequences which extend far beyond its application to the parties before the Court. The Court of Appeals held:

> Jeppesen argues that it is unfair to hold a chart manufacturer strictly liable for accurately republishing a government regulation. We agree. If, for example, a trade journal had accurately published the government's instrument approach procedure in text form and a pilot had used the procedure as printed in the journal, the journal would be immune from strict liability. This case, however, does not present that situation. Jeppesen's charts are more than just a republication of the text of the government's procedures. Jeppesen converts a government procedure from text into graphic form and represents that the chart contains all necessary information.

(Appendix B at 14.)

Under the Court of Appeals' rationale, any person who accurately republishes information prepared by another in a different form would no longer be entitled to the protection of the First Amendment. In this case, the Court of Appeals held Jeppesen liable without fault for converting printed words into graphic form even though the message conveyed was unchanged. This rationale is equally applicable to anyone who converts oral speech into printed words or printed words into computer impulses.

Under the Court of Appeals' decision, many commercial publishers could be held liable without fault for defects in information

supplied by others. A newspaper which accurately republishes a technical National Weather Service forecast in a graphic form easily understood by its readership could be held liable without fault if fishermen are injured as the result of an unpredicted storm.[11] A farm journal which publishes tables of recommended pesticide or herbicide concentrations prepared from information developed by the Department of Agriculture could be held liable without fault if that information later proves to be incorrect and farmers sustain crop damage as a result. A publisher of judicial decisions who transformed written opinions into computer impulses could be held liable without fault if an opinion contained a defamation.[12]

Until the decision in this case, the only decisions to have addressed the issue concluded that publishers cannot be held liable without fault for accurately publishing "defective" information created by another. *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802 (S.D.Texas 1983) (magazine publisher could not be liable without fault for a "defect" in the informational content of the magazine); *Walter v. Bauer*, 439 N.Y.S.2d 821 (1981), *modified on other grounds*, 451 N.Y.S.2d 533 (1982) (publisher of an elementary school science textbook could not be liable on a theory of strict product liability for a "defective" experiment because the intellectual content of the book was not a "product"); *Cardozo v. True*, 342 So.2d 1053 (Fla. 1977) (book store could not be liable on a breach of warranty theory for a "defective" recipe contained in a cookbook which it sold). As the New York court stated:

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[11] While a private publisher was not a party, the United States was held liable for its own negligence under these facts in *Brown v. United States*, 599 F.Supp. 877 (D.Mass. 1984).

[12] In *Beary v. West Publishing Co.*, 763 F.2d 66, 68-69 (2nd Cir. 1985), *cert. denied*, ____ U.S. ____ (1985), the Court of Appeals for the Second Circuit determined that a private reporter of judicial opinions in written form could not, as a matter of public policy, be liable for a defamation which the reporter accurately republished. Under the Ninth Circuit's rationale, West could be liable without fault for accurately transmitting the defamation to the thousands of attorneys subscribing to its "Westlaw" computer service.

> [T]he danger of plaintiff's proposed theory is the chilling effect it would have on the First Amendment—Freedoms of Speech and Press. Would any author wish to be exposed to liability for writing on a topic which might result in physical injury? e.g., How to cut trees; How to keep bees?

*Walter v. Bauer,* 439 N.Y.S.2d at 823.

This Court, too, has previously recognized that a book may not be treated the same as any other product for purposes of strict liability.

> There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller. By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter .... The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The booksellers' self-censorship, compelled by the State, would be a censorship affecting the whole public ....

*Smith v. California,* 361 U.S. 147, 152-54 (1959).

The Court of Appeals' decision will have an inhibiting effect on the flow of information to the public as great as that of the ordinance invalidated in *Smith*. The opinion below advocates self-censorship when it states that if Jeppesen wishes to avoid liability, it may refrain from publishing. No publisher will publish information which has the remotest chance of injuring someone, for fear that at some time in the future a jury will declare the information "defective" and find the publisher liable without fault.[13] If this Court permits the decision below to stand, many publishers will

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[13] See note 6, *supra.*

undoubtedly accept the Court of Appeals' invitation to "refrain" from publishing.

The foregoing applies with even greater force to publishers of laws and government regulations who are forbidden to alter or modify the information they publish. For these publishers, the only options are to publish at their peril or forego publishing. The decision in this case will limit public access to information relating to the functioning of government—the very information the First Amendment was intended to protect.

## CONCLUSION

So long as the decision below remains in force, the public's access to constitutionally protected information will be restricted as publishers limit their publications to information they can be sure will not have injurious consequences. This will be especially true for publishers of laws and government regulations who are forbidden to alter or modify the information they publish. The Court should avail itself of this opportunity to affirm that the First Amendment will not permit a private citizen to be held liable without fault for accurately publishing a law of the United States.

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**(Appendices follow)**

**Appendix A**

United States Court of Appeals

For the Ninth Circuit

C.A. No. 83-2336

D.C. Nos. CV 74-1874, 74-1875, 74-1913, 75-0389, 75-1069, 75-1937, 76-0161 SC

Barbara A. Brocklesby, et al.,
Plaintiffs-Appellees,

vs.

United States of America,
Defendant-Appellee,

and

Jeppesen and Company,
Defendant-Appellant.

OPINION
[Filed Feb. 15, 1985]

Argued and Submitted—December 11, 1984

Appeal from the United States District Court
for the Northern District of California
Honorable Samuel Conti, District Judge, Presiding

Before: CANBY, NORRIS and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

Barbara Brocklesby, Nancy Evans, Frank Evans, Katherine Evans, Norma Chapman, and World Airways, Inc. (collectively "the plaintiffs") brought this action against the United States of America ("the Government") and Jeppesen and Company ("Jeppesen"), seeking damages for wrongful deaths and property damage arising from an airplane crash near Cold Bay, Alaska. In a bifurcated trial, the jury returned a verdict against Jeppesen. Before the district court disposed of claims against the Government, the Government settled with the plaintiffs. An order dismissing the Government was entered. Jeppesen appeals from

the jury verdict and seeks indemnification from the Government. We affirm.

## I

## *BACKGROUND*

On September 8, 1973, an aircraft owned by World Airways crashed into a mountain near Cold Bay Alaska, killing all six crew members and destroying the aircraft and its contents. World Airways and the survivors of the deceased crew members brought separate actions against the Government and Jeppesen, alleging, *inter alia,* that the accident was caused by defects in an instrument approach procedure developed by the Government and published by Jeppesen. The actions were consolidated for trial.

The Federal Aviation Administration ("FAA") designs and publishes standard instrument approach procedures. *See* 14 C.F.R. pt. 97. The FAA's instrument approach procedures are essentially compilations of data, which are set forth in tabular form. Jeppesen uses the FAA's data to portray the instrument approach procedures in graphic form. One of Jeppesen's charts depicts the instrument approach procedure to the Cold Bay, Alaska airport. On the flight at issue in this case, World Airways' pilot was using that chart.

Prior to trial, the Government and Jeppesen entered into a stipulation of compromise settlement ("the indemnity agreement"). The indemnity agreement resolved the claims between the Government and Jeppesen, subject to various conditions. One of the conditions required the parties to submit special interrogatories to the trier of fact. Over the defendants' objections, the district court admitted the indemnity agreement into evidence.

Because the claims against the Government were governed by the Federal Tort Claims Act, the plaintiffs had no right to a jury trial on those claims. *See* 28 U.S.C. § 2402. As a result, the trial was bifurcated, with a jury deciding the claims against Jeppesen and the court deciding the claims against the Government. The case was submitted to the jury under three theories: negligence, breach of warranty, and strict liability. The jury returned a general

verdict against Jeppesen in the amount of $11,630,000. The district court refused to submit special interrogatories to the jury involving the indemnity issues and later refused to answer the interrogatories itself.

Shortly after the district court refused to submit the interrogatories to the jury, the Government settled with the plaintiffs for $5 million. The Government was then dismissed from the suit. The district court denied a motion by Jeppesen to enforce the indemnity agreement.

The district court awarded prejudgment interest in the amount of $6,155,580.81 to World Airways with regard to its claim for the market value of the aircraft. After crediting the $5 million settlement, the district court entered a final judgment for $12,785,580.81 in favor of the plaintiffs and against Jeppesen.

## II

## *ANALYSIS*

### A. *The Indemnity Agreement*

#### 1. *Admissibility*

Federal Rule of Evidence 408 bars the admission of settlement agreements to prove liability. *See generally* 23 C. Wright & K. Graham, *Federal Practice and Procedure* §§ 5301-5315 (1980). The final sentence of Rule 408 provides the exception that is at issue in this case: "This rule . . . does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness . . . ." Jeppesen contends that the only purpose for admitting the indemnity agreement was to prove liability and that the district court abused its discretion by allowing the plaintiffs to introduce it into evidence.[1]

The record does not support Jeppesen's position. At trial, the plaintiffs argued that the indemnity agreement was admissible for

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[1] We review the district court's decisions regarding the admission of evidence under the abuse of discretion standard. *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258 n.5 (9th Cir. 1984).

two purposes. First, the plaintiffs argued that the indemnity agreement was admissible to show the relationship of the parties. The plaintiffs contended that the indemnity agreement showed that Jeppesen and the Government were not adverse.[2] Second, the plaintiffs argued that the indemnity agreement was admissible to attack the credibility of the witnesses for Jeppesen and the Government.[3] The district court admitted the indemnity agreement for those specific purposes.[4] Because those purposes are

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[2] Jeppesen argues that the relationship of the parties was not at issue. The test, however, is not whether the relationship of the parties was an operative fact in the case, but whether it was "relevant" within the meaning of Rule 401. Evidence relating to the relationship of the parties is relevant because it tends to make their respective positions less credible. *See Lewis v. Baker,* 526 F.2d 470, 475 (2d Cir. 1975). At a post-trial hearing, Jeppesen's trial counsel admitted that the indemnity agreement altered the relationship between the Government and Jeppesen:

> We didn't shoot at the government. I dropped two expert witnesses on the subject of the government's procedure in reliance on the fact that the government was going to pay if the jury found the procedure was bad.
>
> I argued in favor of the government, I supported their position, I didn't prosecute, *but the jury knew about the agreement the whole time, so nobody was fooled.* The jury knew from opening statements what our relationship was.

(emphasis added).

[3] Jeppesen argues that the indemnity agreement was not used for this purpose. The record reveals, however, that the indemnity agreement was introduced into evidence during the testimony of Wayne Rosenkrans, the president of Jeppesen. In any event, it was not necessary for the plaintiffs to confront each witness with the indemnity agreement. If the existence of the indemnity agreement made the defendants' witnesses' testimony less credible, it was admissible. *See County of Hennepin v. AFG Industrites, (sic) Inc.,* 726 F.2d 149, 152-53 (8th Cir. 1984); 23 C. Wright & K. Graham, *supra,* § 5311.

[4] Jeppesen asserts that the district court allowed the plaintiffs to use the indemnity agreement for any purpose. The record reveals, however, that the district court admitted the indemnity agreement only for these

distinct from proving liability, the district court did not abuse its discretion by admitting the indemnity agreement.[5]

2. *Limiting Instruction*

Jeppesen contends that the district court committed reversible error by failing to instruct the jury that it could not consider the indemnity agreement as proof of liability. If a limiting instruction is not requested, any error from failure to give the instruction is waived. *Bock v. United States*, 375 F.2d 479, 480 (9th Cir. 1967); *see* Fed. R. Civ. P. 51. Because Jeppesen failed to request an instruction, this issue was not preserved for appeal.[6]

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two limited purposes. The record also reveals that Jeppesen never sought a limiting instruction, as is discussed below.

[5] Jeppesen also argues that the admission of the indemnity agreement was unfairly prejudicial because the jury could hold Jeppesen liable under the belief that the Government would indemnify Jeppesen. While that theory is not implausible, we note that Jeppesen did not contest the introduction of the indemnity agreement on the basis of unfair prejudice. *See* Fed. R. Evid. 403. Instead, Jeppesen based its objection solely on Rule 408 and general principles of relevance. Jeppesen never even mentioned unfair prejudice at trial. In fact, Jeppesen raised the issue of unfair prejudice for the first time in a motion filed after trial. In the absence of a specific and timely objection, we review the admission of evidence for plain error. Fed. R. Evid. 103(a)(1), (d); *see United States v. Wilson*, 690 F.2d 1267, 1273-74 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 205 (1983); *cf. John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635 (3d Cir. 1977) (implying an objection under Rule 403 from a party's arguments under Rule 408). We conclude that the district court's decision to admit the indemnity agreement was not plain error.

[6] Jeppesen argues that its failure to request the instruction can be excused because the plaintiffs sought an identical instruction, which the district court rejected. The record does not support that argument. The "instruction" that the plaintiffs sought was part of the district court's initial statement to the jury prior to voir dire. None of the parties sought a limiting instruction at the time the evidence was admitted or at any other time.

3. *Enforceability*

Jeppesen claims that the district court erred by refusing to enforce the indemnity agreement. 28 U.S.C. § 1346(a)(2) gives district courts concurrent jurisdiction with the United States Claims Court over "[a]ny civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States." Because Jeppesen's claim against the United States under the indemnity agreement exceeds $10,000, the district court lacked jurisdiction. *Murray v. United States,* 405 F.2d 1361, 1366-67 (D.C. Cir. 1968); *see Keene Corp. v. United States,* 700 F.2d 836, 845 n.13 (2d Cir.), *cert. denied,* 104 S. Ct. 195 (1983); *Glover v. Johns-Manville Corp.,* 662 F.2d 225, 230-32 (4th Cir. 1981).

Because the issue of indemnity was not before the jury, the district court was not obligated to submit interrogatories on that issue. The district court concluded that submission of the interrogatories would be confusing and would create a possibility of inconsistent verdicts. The record reveals no grounds for finding that the district court abused its discretion.

4. *Due Process*

Jeppesen contends that the trial of this case was so fundamentally unfair that Jeppesen did not receive due process of law. We disagree. Jeppesen had a full and fair opportunity to present its case before the district court. If Jeppesen felt that the admission of the indemnity agreement was unfair, a timely and specific objection under Rule 403 or a request for a limiting instruction would have been appropriate.

Jeppesen also argues that the admission of the indemnity agreement deprived it of due process because the indemnity agreement eventually became unenforceable. Jeppesen contends that the trial was thus based on false evidence. We disagree. The indemnity agreement was admitted to show the relationship of the parties and to impeach witnesses. At the time of trial, the indemnity agreement was an accurate reflection of the relationship of the parties and the biases, if any, of the witnesses. While the indemnity agreement would have been "false" if it had been admitted to prove that the Government would indemnify Jep-

pesen, it was not admitted for that purpose. We reject Jeppesen's due process claims.

B. *Liability*

The case was submitted to the jury on three theories of liability: strict liability, breach of warranty, and negligence.[7] The jury returned a general verdict against Jeppesen. Accordingly, the judgment must be reversed if any of the three theories is legally defective. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *Jones v. Miles*, 656 F.2d 103, 106 (5th Cir. 1981). Jeppesen argues (1) that this case does not involve a defective "product" for purposes of strict liability, (2) that the defects in the Government's instrument approach procedure will not support a finding of strict liability against Jeppesen, (3) that the evidence produced at trial does not establish negligence, and (4) that various policy considerations bar any tort liability in this case.[8]

1. *Strict Products Liability*

a. *The Existence of a "Product"*

Jeppesen argues that the Government's instrument approach procedure is not a "product" within the meaning of *Restatement (Second) of Torts* § 402A (1965). While that may be true, it misses the point. The issue is whether Jeppesen's chart is a product, not whether the instrument approach procedure is a product. In *Aetna Casualty and Surety Co. v. Jeppesen & Co.*, 642

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[7] Although the district court never made a finding regarding its choice of law, the parties assume that California law applies. California conflict of laws principles govern this choice. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). We conclude that the California courts would apply California law to this case. *See Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972). *See generally* R. Weintraub, *Commentary on the Conflict of Laws* § 6.29 (2d ed. 1980) (discussing choice of law problems in products liability cases).

[8] Jeppesen only challenges the breach of warranty theory on the ground that the chart was not a "product."

F.2d 339, 341-42 (9th Cir. 1981) (applying Nevada law), we analyzed the problem as follows:

> Jeppesen approach charts depict graphically the instrument approach procedure for the particular airport as that procedure has been promulgated by the Federal Aviation Administration (FAA) after testing and administrative approval. The procedure includes all pertinent aspects of the approach such as directional heading, distances, minimum altitudes, turns, radio frequencies and procedures to be followed if an approach is missed. The specifications prescribed are set forth by the FAA in tabular form. Jeppesen acquires this FAA form and portrays the information therein on a graphic approach chart. This is Jeppesen's "product."

*Accord Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983) ("Though a 'product' may not include mere provision of architectural design plans or any similar form of data supplied under individually-tailored service arragements, . . . the mass production and marketing of these charts requires Jeppesen to bear the costs of accidents that are proximately caused by defects in the charts.") (applying Colorado law). We agree with the plaintiffs' position that Jeppesen's chart was a defective product for purposes of analysis under section 402A.[9]

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[9] Jeppesen cites several cases for the proposition that published ideas are not "products." *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802, 803 (S.D. Tex. 1983) (magazine article); *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App.) (recipe in a cookbook), *cert. denied*, 353 So. 2d 674 (Fla. 1977); *Walter v. Bauer*, 109 Misc. 2d 189, 439 N.Y.S.2d 821, 822 (Sup. Ct. 1981) (experiment in textbook), *modified on other grounds*, 88 A.D.2d 787, 451 N.Y.S.2d 533 (1982). *See generally* McCowan, *Liability of the Chartmaker*, 47 Ins. Counsel J. 359 (1980). *Cardozo*, *Walter*, and *Herceg* stand for the proposition that books and magazines are not rendered defective by their contents. As a result, those cases are distinguishable. The plaintiffs are alleging that the chart was unreasonably dangerous in its intended use because of design defects. In *Cardozo*, *Walter*, and *Herceg*, on the other hand, the books and magazines were not dangerous for their intended use. *E.g.*, *Walter*, 439 N.Y.S.2d at 822 (noting that the plaintiff "was not injured by use of the book for the purpose for which it was designed, i.e., to be read"). By

b. *Liability for Defects in the Government's Procedure*

This case is distinguishable from *Aetna* and *Saloomey* because the Jeppesen chart involved in this case accurately portrayed the instrument approach procedure provided by the Government. All of the defects in the Jeppesen chart stem from the Government's alleged failure to establish a safe instrument approach procedure. The district court instructed the jury as follows:

> Now, the fact that Jeppesen's instrument approach charts are based on information which is supplied by the F.A.A. and which Jeppesen cannot deviate from or modify does not relieve Jeppesen from liability if a defect in the Jeppesen chart was a proximate cause of the accident. The manufacturer of a product is strictly liable for defects in that product even though the defect can be traced to a component part supplied by another. Thus if you find that Jeppesen's instrument approach chart is defective and that the defect was a proximate cause of the accident, you must find Jeppesen liable even if the defect exists only because you find that the F.A.A. designed an approach procedure that you find is itself defective. The issue is: was the Jeppesen chart defective?

The validity of that instruction presents a case of first impression.

Jeppesen contends that strict liability is inappropriate because the Government's procedure was beyond its control.[10] In essence, Jeppesen is arguing that it should not be held strictly liable

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contrast, Jeppesen's chart was allegedly dangerous for the use for which it was designed. *See Saloomey,* 707 F.2d at 676-77.

[10] Jeppesen's position resembles the "contract specifications" defense. Under the contract specifications defense, a manufacturer cannot be held liable for producing a product in accordance with specifications that are beyond its control. *See* Note, *Liability of a Manufacturer for Products Defectively Designed by the Government,* 23 B.C.L. Rev. 1025, 1032-48 (1982). The California courts have rejected the application of this defense to strict liability claims. *Rawlings v. D.M. Oliver, Inc.,* 97 Cal. App. 3d 890, 896-97, 159 Cal. Rptr. 119, 121-22 (1979); *accord Challoner v. Day & Zimmerman, Inc.,* 512 F.2d 77, 82-83 (5th Cir.), *vacated on other grounds,* 423 U.S. 3 (1975); *see* Note, *supra,* at 1039-43.

because it is without fault in this case. It is beyond doubt that the concept of fault continues to have a role in strict liability law. *See* Powers, *The Persistence of Fault in Products Liability,* 61 Texas L. Rev. 777 (1983). Nevertheless, Jeppesen's position is untenable.

Initially, we note that Jeppesen had at least some ability to prevent injuries to users of its charts. Jeppesen's production specifications manual required its employees to research any procedure thoroughly "to determine its validity and completeness." Jeppesen's president, Wayne Rosenkrans, testified that this requirement applied to the construction and composition of charts such as the one involved in this case. Jeppesen's manual requires its employees to contact official sources to resolve apparent discrepancies in information. Jeppesen maintained an office in Washington, D.C. with liaison to the FAA. Rosenkrans testified that Jeppesen's actions had led to changes in Government procedures. Accordingly, Jeppesen had both the ability to detect an error and a mechanism for seeking corrections. Under these circumstances, we reject Jeppesen's argument that the Government's procedure was completely beyond Jeppesen's control.

More fundamentally, however, existing products liability law is contrary to Jeppesen's position. Assuming that the Government's instrument approach procedure was defective, the literal requirements of section 402A are met. Jeppesen's chart was a "product in a defective condition unreasonably dangerous to the user" within the meaning of section 402A(1). Section 402A(2)(a) provides that strict liability is appropriate even though "the seller has exercised all possible care in the preparation and sale of his product." A seller is strictly liable for injuries caused by a defective product even though the defect originated from a component part manufactured by another party. *E.g., Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 170, 37 Cal. Rptr. 896, 898 (1964); *see Prosser and Keeton on the Law of Torts* § 100, at 705 (W. Keeton 5th ed. 1984). Accordingly, the appropriate focus of inquiry is not whether Jeppesen caused the product to be defective, but whether the product was in fact defective. *See Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962).

The concept of fault has persisted in substantive products liability law primarily in determining whether a defective product is "unreasonably dangerous." *See* Powers, *supra*, at 781-97. We note that the California courts have sought to purge the concept of fault from strict liability law by focusing on the existence of a defect, rather then (sic) inquiring whether the product is unreasonably dangerous. *E.g., Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 422-26, 573 P.2d 443, 449-52, 143 Cal. Rptr. 225, 231-34 (1978); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 127-35, 501 P.2d 1153, 1158-63, 104 Cal. Rptr. 433, 438-43 (1972). To the extent that Jeppesen's product was defective, the case law does not support an attempt to relieve Jeppesen of liability on the ground that the defect was not Jeppesen's fault. Comment *c* to section 402A of the *Restatement (Second) of Torts* states the policies underlying strict products liability as follows:

> [T]he justification for strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper person to afford it are those who market the product.

*See also Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring). All of those policies apply to the plaintiffs' claim in this case. To the extent that Jeppesen is held liable for the Government's misfeasance, Jeppesen had a right to seek tort law indemnification.[11] The fact

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[11] *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 198 (1983); *see* 28 U.S.C. § 2674. Of course, the Government is not subject

that Jeppesen failed to seek tort law indemnification has no bearing on the plaintiffs' substantive rights.

c. *Sufficiency of the Evidence*

Jeppesen contends that the evidence presented at trial did not prove that the chart was defective. The plaintiffs produced evidence regarding several alleged defects. One of the alleged defects was the absence of a transition arc. Jeppesen's only response to that allegation is that it had no power to alter the Government's procedure. As noted above, that is not a valid defense. Accordingly, we conclude that the plaintiffs introduced sufficient evidence to support a finding that the chart was defective.

2. *Negligence*

Jeppesen contends that it cannot be held liable for negligence on the facts presented at trial. The district court instructed the jury as follows:

> Now, one who supplies a product, either directly or through a third person, for another to use, which the supplier knows or has reason to know is dangerous or is likely to be dangerous for the use for which it is supplied, has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use if the supplier has reason to believe that they will not realize its dangerous condition. A failure to fulfill that duty is negligence. This rule applies to a producer of a product.
>
> The producer of a product that is reasonably certain to be dangerous if negligently made, has a duty to exercise reasonable care in the design, production, testing and inspection of the product and in the testing and inspection of any component parts made by another so that the product may be safely used in a manner and for a purpose for which it was made.
>
> A failure to fulfill that duty is negligence.

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to strict liability in tort. *E.g.*, *Petty v. United States*, 679 F.2d 719, 726 (8th Cir. 1982).

The district court's instructions correctly stated the law.[12] In light of Jeppesen's internal operating procedures, which required testing for completeness, and its failure to detect the defects in the instrument approach procedure, the jury could reasonably have found that Jeppesen was negligent in failing to warn users of the latent defects in the chart.

Jeppesen argues that it had no ability to change the procedure and that it had no duty to control the actions of the Government. Both arguments miss the point. The negligence theory was submitted to the jury on a "duty to test/duty to warn" theory, rather than on a "duty to control the Government" theory. Jeppesen can be held liable for negligently failing to detect the defect in the product that it marketed. If it had discovered the defect, Jeppesen would have been required either to warn the users of the chart or to refrain from selling the product.

3. *Public Policy Defenses*

Jeppesen asserts a first amendment privilege against liability based on commercial speech. Even assuming that this case involves commercial speech, however, it is well established that commercial speech is subject to many forms of regulation. *E.g., Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 455-56 (1978); *see* Faber, *Commercial Speech and First Amendment Theory,* 74 Nw. U.L. Rev. 372 (1979). The public may be protected from false or misleading commercial messages. *See Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 563 (1980). Requiring a chart manufacturer to produce a safe product would have no significant chilling effect

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[12] The manufacturer of a potentially hazardous product has a duty to conduct reasonable tests and inspections to detect latent defects. *Putensen v. Clay Adams, Inc.,* 12 Cal. App. 3d 1062, 1078, 91 Cal. Rptr. 319, 329 (1970); *see* 1 L. Frumer & M. Friedman, *Products Liability* § 6.01[1] (1984). The failure of the manufacturer to warn consumers of defects of which the manufacturer is or should be aware constitutes negligence. *Lunghi v. Clark Equipment Co.,* 153 Cal. App. 3d 485, 491-95, 200 Cal. Rptr. 387, 389-92 (1984); *Putensen,* 12 Cal. App. 3d at 1076-77, 91 Cal. Rptr. at 328; *see* 1A L. Frumer & M. Friedman, *supra,* § 8.01.

on freedom of speech. Accordingly, Jeppesen's tortious conduct was not privileged. *See Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 48, 539 P.2d 36, 40, 123 Cal. Rptr. 468, 472 (1975); *cf.* Note, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 Ind. L.J. 503 (1984) (discussing the more stringent standards applied to products liability claims against media defendants).

Jeppesen also claims a privilege under Cal. Civ. Code § 47(4). Section 47(4) only applies to reports in a "public journal." Jeppesen's charts are not a public journal.

C. *Prejudgment Interest*

1. *Right to a Jury Trial*

Jeppesen contends that the district court's award of prejudgment interest to the plaintiffs violated its right to a jury trial. Jeppesen notes that Cal. Civ. Code § 3288 leaves the decision to award prejudgment interest to the jury. The district court, however, based its award on Cal. Civ. Code § 3287(a), which does not require a jury determination. But even if Jeppesen had the right to a jury trial, it waived any objection to the district court's actions by failing to object at trial. The record reveals that Jeppesen has raised this issue for the first time on appeal.

2. *Availability of Prejudgment Interest*

Section 3287(a) provides, in pertinent part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to recover interest thereon from that day." The plaintiffs claim that the value of the property damage to the aircraft was "capable of being made certain by calculation." The district court agreed and awarded prejudgment interest.

In order for damages to be "certain," it is not necessary that they be liquidated. All that is required is established or reasonably ascertainable market prices or values for the property destroyed. *Lineman v. Schmid*, 32 Cal. 2d 204, 212, 195 P.2d 408, 413 (1948). The fact that the plaintiff prays for an amount in excess

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of the actual award does not render damages uncertain. *Ferro v. Citizens National Trust & Savings Bank*, 44 Cal. 2d 401, 415-16, 282 P.2d 849, 857 (1955); *National Farm Workers Service Center, Inc. v. Caratan*, 146 Cal. App. 3d 796, 811, 194 Cal. Rptr. 617, 627 (1983).

In this case, the damages related to the destruction of the aircraft consist of four components: (1) the base value of the aircraft, (2) the value of a spare parts kit and other material aboard the aircraft, (3) the cost of recovering the remains of those aboard the aircraft, and (4) the value of various specific features or "extras" on board the aircraft. The value of the first, second, and third components is undisputed. The experts disagreed only on the value of the fourth component. Thus, the following damages were undisputed:

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|---|---|
| Destruction of the aircraft | $9,000,000 |
| Spare parts kit, etc. | 253,420 |
| Expenses to recover remains | 27,575 |
| Total | $9,280,995 |

The jury awarded $9.3 million, which was only $19,005 more than the undisputed total. $9.3 million is also the figure suggested by Jeppesen's counsel in closing argument.

We agree with the district court's conclusion that the damages were certain. The mere fact that the amount of damages was in dispute is not dispositive. *Esgro Central, Inc. v. General Insurance Co.*, 20 Cal. App. 3d 1054, 1062-63, 98 Cal. Rptr. 153, 158 (1971). The only disputed issue was the value of the "extras." Even though the jury evidently rejected the plaintiffs' contentions regarding the "extras," the remaining components had reasonably ascertainable market values. Accordingly, the damages were sufficiently certain to justify an award of prejudgment interest. *See Caratan*, 146 Cal. App. 3d at 811, 194 Cal. Rptr. at 857.

## III

## *CONCLUSION*

The judgment of the district court is AFFIRMED.[13]

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[13] Jeppesen's motion to strike portions of the excerpts of record is denied.

**Appendix B**

United States Court of Appeals
For the Ninth Circuit

C.A. No. 83-2336

D.C. Nos. CV 74-1874, 74-1875,
74-1913, 75-0389, 75-1069,
75-1937, 76-0161 SC

Barbara A. Brocklesby, et al.,
Plaintiffs-Appellees,

vs.

United States of America,
Defendant-Appellee,

and

Jeppesen and Company,
Defendant-Appellant.

ORDER
[Filed Aug. 2, 1985]

Before: CANBY, NORRIS and BEEZER, Circuit Judges.

The previous disposition in this case is withdrawn and the following amended opinion is substituted.

The panel, having amended the opinion, has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

United States Court of Appeals
For the Ninth Circuit

C.A. No. 83-2336

D.C. Nos. CV 74-1874, 74-1875,
74-1913, 75-0389, 75-1069,
75-1937, 76-0161 SC

Barbara A. Brocklesby, et al.,
Plaintiffs-Appellees,

vs.

United States of America,
Defendant-Appellee,

and

Jeppesen and Company,
Defendant-Appellant.

AMENDED OPINION
[Filed Aug. 2, 1985]

Argued and Submitted—December 11, 1984—
San Francisco, California

Appeal from the United States District Court
for the Northern District of California
Honorable Samuel Conti, District Judge, Presiding

Decided February 15, 1985;
Amended August 2, 1985

Before: CANBY, NORRIS and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

Barbara Brocklesby, Nancy Evans, Frank Evans, Katherine Evans, Norma Chapman, and World Airways, Inc. (collectively "the plaintiffs") brought this action against the United States of America ("the Government") and Jeppesen and Company ("Jeppesen"), seeking damages for wrongful deaths and property damage arising from an airplane crash near Cold Bay, Alaska. In a bifurcated trial, the jury returned a verdict against Jeppesen. Before the district court disposed of claims against the Government, the Government settled with the plaintiffs. An order dismissing the Government was entered. Jeppesen appeals from

the jury verdict and seeks indemnification from the Government. We affirm.

## I

## *BACKGROUND*

On September 8, 1973, an aircraft owned by World Airways crashed into a mountain near Cold Bay Alaska, killing all six crew members and destroying the aircraft and its contents. World Airways and the survivors of the deceased crew members brought separate actions against the Government and Jeppesen, alleging, *inter alia,* that the accident was caused by defects in an instrument approach procedure developed by the Government and published by Jeppesen. The actions were consolidated for trial.

The Federal Aviation Administration ("FAA") designs and publishes standard instrument approach procedures. *See* 14 C.F.R. pt. 97. The FAA's instrument approach procedures are essentially compilations of data, which are set forth in tabular form. Jeppesen uses the FAA's data to portray the instrument approach procedures in graphic form. One of Jeppesen's charts depicts the instrument approach procedure to the Cold Bay, Alaska airport. On the flight at issue in this case, World Airways' pilot was using that chart.

Prior to trial, the Government and Jeppesen entered into a stipulation of compromise settlement ("the indemnity agreement"). The indemnity agreement resolved the claims between the Government and Jeppesen, subject to various conditions. One of the conditions required the parties to submit special interrogatories to the trier of fact. Over the defendants' objections, the district court admitted the indemnity agreement into evidence.

Because the claims against the Government were governed by the Federal Tort Claims Act, the plaintiffs had no right to a jury trial on those claims. *See* 28 U.S.C. § 2402. As a result, the trial was bifurcated, with a jury deciding the claims against Jeppesen and the court deciding the claims against the Government. The case was submitted to the jury under three theories: negligence, breach of warranty, and strict liability. The jury returned a general

verdict against Jeppesen in the amount of $11,630,000. The district court refused to submit special interrogatories to the jury involving the indemnity issues and later refused to answer the interrogatories itself.

Shortly after the district court refused to submit the interrogatories to the jury, the Government settled with the plaintiffs for $5 million. The Government was then dismissed from the suit. The district court denied a motion by Jeppesen to enforce the indemnity agreement.

The district court awarded prejudgment interest in the amount of $6,155,580.81 to World Airways with regard to its claim for the market value of the aircraft. After crediting the $5 million settlement, the district court entered a final judgment for $12,785,580.81 in favor of the plaintiffs and against Jeppesen.

## II

## *ANALYSIS*

### A. *The Indemnity Agreement*

#### 1. *Admissibility*

Federal Rule of Evidence 408 bars the admission of settlement agreements to prove liability. *See generally* 23 C. Wright & K. Graham, *Federal Practice and Procedure* §§ 5301-5315 (1980). The final sentence of Rule 408 provides the exception that is at issue in this case: "This rule . . . does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness . . . ." Jeppesen contends that the only purpose for admitting the indemnity agreement was to prove liability and that the district court abused its discretion by allowing the plaintiffs to introduce it into evidence.[1]

The record does not support Jeppesen's position. At trial, the plaintiffs argued that the indemnity agreement was admissible for

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[1] We review the district court's decisions regarding the admission of evidence under the abuse of discretion standard. *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258 n.5 (9th Cir. 1984).

two purposes. First, the plaintiffs argued that the indemnity agreement was admissible to show the relationship of the parties. The plaintiffs contended that the indemnity agreement showed that Jeppesen and the Government were not adverse.[2] Second, the plaintiffs argued that the indemnity agreement was admissible to attack the credibility of the witnesses for Jeppesen and the Government.[3] The district court admitted the indemnity agreement for those specific purposes.[4] Because those purposes are

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[2] Jeppesen argues that the relationship of the parties was not at issue. The test, however, is not whether the relationship of the parties was an operative fact in the case, but whether it was "relevant" within the meaning of Rule 401. Evidence relating to the relationship of the parties is relevant because it tends to make their respective positions less credible. *See Lewis v. Baker,* 526 F.2d 470, 475 (2d Cir. 1975). At a post-trial hearing, Jeppesen's trial counsel admitted that the indemnity agreement altered the relationship between the Government and Jeppesen:

> We didn't shoot at the government. I dropped two expert witnesses on the subject of the government's procedure in reliance on the fact that the government was going to pay if the jury found the procedure was bad.
>
> I argued in favor of the government, I supported their position, I didn't prosecute, *but the jury knew about the agreement the whole time, so nobody was fooled.* The jury knew from opening statements what our relationship was.

(emphasis added).

[3] Jeppesen argues that the indemnity agreement was not used for this purpose. The record reveals, however, that the indemnity agreement was introduced into evidence during the testimony of Wayne Rosenkrans, the president of Jeppesen. In any event, it was not necessary for the plaintiffs to confront each witness with the indemnity agreement. If the existence of the indemnity agreement made the defendants' witnesses' testimony less credible, it was admissible. *See County of Hennepin v. AFG Industries, Inc.,* 726 F.2d 149, 152-53 (8th Cir. 1984); 23 C. Wright & K. Graham, *supra,* § 5311.

[4] Jeppesen asserts that the district court allowed the plaintiffs to use the indemnity agreement for any purpose. The record reveals, however, that the district court admitted the indemnity agreement only for these

distinct from proving liability, the district court did not abuse its discretion by admitting the indemnity agreement.[5]

2. *Limiting Instruction*

Jeppesen contends that the district court committed reversible error by failing to instruct the jury that it could not consider the indemnity agreement as proof of liability. If a limiting instruction is not requested, any error from failure to give the instruction is waived. *Bock v. United States,* 375 F.2d 479, 480 (9th Cir. 1967); *see* Fed. R. Civ. P. 51. Because Jeppesen failed to request an instruction, this issue was not preserved for appeal.[6]

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two limited purposes. The record also reveals that Jeppesen never sought a limiting instruction, as is discussed below.

[5] Jeppesen also argues that the admission of the indemnity agreement was unfairly prejudicial because the jury could hold Jeppesen liable under the belief that the Government would indemnify Jeppesen. While that theory is not implausible, we note that Jeppesen did not contest the introduction of the indemnity agreement on the basis of unfair prejudice. *See* Fed. R. Evid. 403. Instead, Jeppesen based its objection solely on Rule 408 and general principles of relevance. Jeppesen never even mentioned unfair prejudice at trial. In fact, Jeppesen raised the issue of unfair prejudice for the first time in a motion filed after trial. In the absence of a specific and timely objection, we review the admission of evidence for plain error. Fed. R. Evid. 103(a)(1), (d); *see United States v. Wilson,* 690 F.2d 1267, 1273-74 (9th Cir. 1982), *cert. denied,* 104 S. Ct. 205 (1983); *cf. John McShain, Inc. v. Cessna Aircraft Co.,* 563 F.2d 632, 635 (3d Cir. 1977) (implying an objection under Rule 403 from a party's arguments under Rule 408). We conclude that the district court's decision to admit the indemnity agreement was not plain error.

[6] Jeppesen argues that its failure to request the instruction can be excused because the plaintiffs sought an identical instruction, which the district court rejected. The record does not support that argument. The "instruction" that the plaintiffs sought was part of the district court's initial statement to the jury prior to voir dire. None of the parties sought a limiting instruction at the time the evidence was admitted or at any other time.

3. *Enforceability*

Jeppesen claims that the district court erred by refusing to enforce the indemnity agreement. 28 U.S.C. § 1346(a)(2) gives district courts concurrent jurisdiction with the United States Claims Court over "[a]ny civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States." Because Jeppesen's claim against the United States under the indemnity agreement exceeds $10,000, the district court lacked jurisdiction. *Murray v. United States,* 405 F.2d 1361, 1366-67 (D.C. Cir. 1968); *see Keene Corp. v. United States,* 700 F.2d 836, 845 n.13 (2d Cir.), *cert. denied,* 104 S. Ct. 195 (1983); *Glover v. Johns-Manville Corp.,* 662 F.2d 225, 230-32 (4th Cir. 1981).

Because the issue of indemnity was not before the jury, the district court was not obligated to submit interrogatories on that issue. The district court concluded that submission of the interrogatories would be confusing and would create a possibility of inconsistent verdicts. The record reveals no grounds for finding that the district court abused its discretion.

4. *Due Process*

Jeppesen contends that the trial of this case was so fundamentally unfair that Jeppesen did not receive due process of law. We disagree. Jeppesen had a full and fair opportunity to present its case before the district court. If Jeppesen felt that the admission of the indemnity agreement was unfair, a timely and specific objection under Rule 403 or a request for a limiting instruction would have been appropriate.

Jeppesen also argues that the admission of the indemnity agreement deprived it of due process because the indemnity agreement eventually became unenforceable. Jeppesen contends that the trial was thus based on false evidence. We disagree. The indemnity agreement was admitted to show the relationship of the parties and to impeach witnesses. At the time of trial, the indemnity agreement was an accurate reflection of the relationship of the parties and the biases, if any, of the witnesses. While the indemnity agreement would have been "false" if it had been admitted to prove that the Government would indemnify Jep-

pesen, it was not admitted for that purpose. We reject Jeppesen's due process claims.

B. *Liability*

The case was submitted to the jury on three theories of liability: strict liability, breach of warranty, and negligence.[7] The jury returned a general verdict against Jeppesen. Accordingly, the judgment must be reversed if any of the three theories is legally defective. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *Jones v. Miles*, 656 F.2d 103, 106 (5th Cir. 1981). Jeppesen argues (1) that this case does not involve a defective "product" for purposes of strict liability, (2) that the defects in the Government's instrument approach procedure will not support a finding of strict liability against Jeppesen, (3) that the evidence produced at trial does not establish negligence, and (4) that various policy considerations bar any tort liability in this case.[8]

1. *Strict Products Liability*

a. *The Existence of a "Product"*

Jeppesen argues that the Government's instrument approach procedure is not a "product" within the meaning of *Restatement (Second) of Torts* § 402A (1965). While that may be true, it misses the point. The issue is whether Jeppesen's chart is a product, not whether the instrument approach procedure is a product. In *Aetna Casualty and Surety Co. v. Jeppesen & Co.*, 642

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[7] Although the district court never made a finding regarding its choice of law, the parties assume that California law applies. California conflict of laws principles govern this choice. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). We conclude that the California courts would apply California law to this case. *See Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972). *See generally* R. Weintraub, *Commentary on the Conflict of Laws* § 6.29 (2d ed. 1980) (discussing choice of law problems in products liability cases).

[8] Jeppesen only challenges the breach of warranty theory on the ground that the chart was not a "product."

F.2d 339, 341-42 (9th Cir. 1981) (applying Nevada law), we analyzed the problem as follows:

> Jeppesen approach charts depict graphically the instrument approach procedure for the particular airport as that procedure has been promulgated by the Federal Aviation Administration (FAA) after testing and administrative approval. The procedure includes all pertinent aspects of the approach such as directional heading, distances, minimum altitudes, turns, radio frequencies and procedures to be followed if an approach is missed. The specifications prescribed are set forth by the FAA in tabular form. Jeppesen acquires this FAA form and portrays the information therein on a graphic approach chart. This is Jeppesen's "product."

*Accord Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983) ("Though a 'product' may not include mere provision of architectural design plans or any similar form of data supplied under individually-tailored service arragements, . . . the mass production and marketing of these charts requires Jeppesen to bear the costs of accidents that are proximately caused by defects in the charts.") (applying Colorado law). We agree with the plaintiffs' position that Jeppesen's chart was a defective product for purposes of analysis under section 402A.[9]

b. *Liability for Defects in the Government's Procedure*

This case is distinguishable from *Aetna* and *Saloomey* because the Jeppesen chart involved in this case accurately portrayed the instrument approach procedure provided by the Government. All of the defects in the Jeppesen chart stem from the Government's

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[9] We do not address Jeppesen's claim that the First Amendment renders the theory of strict liability for a defective product inapplicable to published material such as its charts. The general rule is that an issue will not be considered for the first time on appeal. *Taylor v. Sentry Life Insurance Co.*, 729 F.2d 652, 655 (9th Cir. 1984). Since Jeppesen did not raise the First Amendment argument at any time below and did not object to the jury instructions on strict liability except by implication in summary judgment proceedings, Jeppesen has not properly preserved for appeal this objection to the jury instructions.

alleged failure to establish a safe instrument approach procedure. The district court instructed the jury as follows:

> Now, the fact that Jeppesen's instrument approach charts are based on information which is supplied by the F.A.A. and which Jeppesen cannot deviate from or modify does not relieve Jeppesen from liability if a defect in the Jeppesen chart was a proximate cause of the accident. The manufacturer of a product is strictly liable for defects in that product even though the defect can be traced to a component part supplied by another. Thus if you find that Jeppesen's instrument approach chart is defective and that the defect was a proximate cause of the accident, you must find Jeppesen liable even if the defect exists only because you find that the F.A.A. designed an approach procedure that you find is itself defective. The issue is: was the Jeppesen chart defective?

The validity of that instruction presents a case of first impression.

Jeppesen contends that strict liability is inappropriate because the Government's procedure was beyond its control.[10] In essence, Jeppesen is arguing that it should not be held strictly liable because it is without fault in this case. It is beyond doubt that the concept of fault continues to have a role in strict liability law. *See* Powers, *The Persistence of Fault in Products Liability,* 61 Texas L. Rev. 777 (1983). Nevertheless, Jeppesen's position is untenable.

Initially, we note that Jeppesen had at least some ability to prevent injuries to users of its charts. Jeppesen's production

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[10] Jeppesen's position resembles the "contract specifications" defense. Under the contract specifications defense, a manufacturer cannot be held liable for producing a product in accordance with specifications that are beyond its control. *See* Note, *Liability of a Manufacturer for Products Defectively Designed by the Government,* 23 B.C.L. Rev. 1025, 1032-48 (1982). The California courts have rejected the application of this defense to strict liability claims. *Rawlings v. D.M. Oliver, Inc.,* 97 Cal. App. 3d 890, 896-97, 159 Cal. Rptr. 119, 121-22 (1979); *accord Challoner v. Day & Zimmerman, Inc.,* 512 F.2d 77, 82-83 (5th Cir.), *vacated on other grounds,* 423 U.S. 3 (1975); *see* Note, *supra,* at 1039-43.

specifications manual required its employees to research any procedure thoroughly "to determine its validity and completeness." Jeppesen's president, Wayne Rosenkrans, testified that this requirement applied to the construction and composition of charts such as the one involved in this case. Jeppesen's manual requires its employees to contact official sources to resolve apparent discrepancies in information. Jeppesen maintained an office in Washington, D.C. with liaison to the FAA. Rosenkrans testified that Jeppesen's actions had led to changes in Government procedures. Accordingly, Jeppesen had both the ability to detect an error and a mechanism for seeking corrections. Under these circumstances, we reject Jeppesen's argument that the Government's procedure was completely beyond Jeppesen's control.

More fundamentally, however, existing products liability law is contrary to Jeppesen's position. Assuming that the Government's instrument approach procedure was defective, the literal requirements of section 402A are met. Jeppesen's chart was a "product in a defective condition unreasonably dangerous to the user" within the meaning of section 402A(1). Section 402A(2)(a) provides that strict liability is appropriate even though "the seller has exercised all possible care in the preparation and sale of his product." A seller is strictly liable for injuries caused by a defective product even though the defect originated from a component part manufactured by another party. *E.g., Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262, 391 P.2d 168, 170, 37 Cal. Rptr. 896, 898 (1964); *see Prosser and Keeton on the Law of Torts* § 100, at 705 (W. Keeton 5th ed. 1984). Accordingly, the appropriate focus of inquiry is not whether Jeppesen caused the product to be defective, but whether the product was in fact defective. *See Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

The concept of fault has persisted in substantive products liability law primarily in determining whether a defective product is "unreasonably dangerous." *See* Powers, *supra*, at 781-97. We note that the California courts have sought to purge the concept of fault from strict liability law by focusing on the existence of a defect, rather than inquiring whether the product is unreasonably dangerous. *E.g., Barker v. Lull Engineering Co.*, 20 Cal. 3d 413,

422- ., 573 P.2d 443, 449-52, 143 Cal. Rptr. 225, 231-34 (1978); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 127-35, 501 P.2d 1153, 1158-63, 104 Cal. Rptr. 433, 438-43 (1972). To the extent that Jeppesen's product was defective, the case law does not support an attempt to relieve Jeppesen of liability on the ground that the defect was not Jeppesen's fault. Comment *c* to section 402A of the *Restatement (Second) of Torts* states the policies underlying strict products liability as follows:

> [T]he justification for strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper person to afford it are those who market the product.

*See also Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring). All of those policies apply to the plaintiffs' claim in this case. To the extent that Jeppesen is held liable for the Government's misfeasance, Jeppesen had a right to seek tort law indemnification.[11] The fact that Jeppesen failed to seek tort law indemnification has no bearing on the plaintiffs' substantive rights.

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[11] *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 198 (1983); *see* 28 U.S.C. § 2674. Of course, the Government is not subject to strict liability in tort. *E.g.*, *Petty v. United States*, 679 F.2d 719, 726 (8th Cir. 1982).

c. *Sufficiency of the Evidence*

Jeppesen contends that the evidence presented at trial did not prove that the chart was defective. The plaintiffs produced evidence regarding several alleged defects. One of the alleged defects was the absence of a transition arc. Jeppesen's only response to that allegation is that it had no power to alter the Government's procedure. As noted above, that is not a valid defense. Accordingly, we conclude that the plaintiffs introduced sufficient evidence to support a finding that the chart was defective.

2. *Negligence*

Jeppesen contends that it cannot be held liable for negligence on the facts presented at trial. The district court instructed the jury as follows:

> Now, one who supplies a product, either directly or through a third person, for another to use, which the supplier knows or has reason to know is dangerous or is likely to be dangerous for the use for which it is supplied, has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use if the supplier has reason to believe that they will not realize its dangerous condition. A failure to fulfill that duty is negligence. This rule applies to a producer of a product.
>
> The producer of a product that is reasonably certain to be dangerous if negligently made, has a duty to exercise reasonable care in the design, production, testing and inspection of the product and in the testing and inspection of any component parts made by another so that the product may be safely used in a manner and for a purpose for which it was made.
>
> A failure to fulfill that duty is negligence.

The district court's instructions correctly stated the law.[12] In light of Jeppesen's internal operating procedures, which required test-

[12] The manufacturer of a potentially hazardous product has a duty to conduct reasonable tests and inspections to detect latent defects. *Puten-*

ing for completeness, and its failure to detect the defects in the instrument approach procedure, the jury could reasonably have found that Jeppesen was negligent in failing to warn users of the latent defects in the chart.

Jeppesen argues that it had no ability to change the procedure and that it had no duty to control the actions of the Government. Both arguments miss the point. The negligence theory was submitted to the jury on a "duty to test/duty to warn" theory, rather than on a "duty to control the Government" theory. Jeppesen can be held liable for negligently failing to detect the defect in the product that it marketed. If it had discovered the defect, Jeppesen would have been required either to warn the users of the chart or to refrain from selling the product.

3. *Public Policy Defenses*

Jeppesen argues that it is unfair to hold a chart manufacturer strictly liable for accurately republishing a government regulation. We agree. If, for example, a trade journal had accurately published the government's instrument approach procedure in text form and a pilot had used the procedure as printed in the journal, the journal would be immune from strict liability. This case, however, does not present that situation. Jeppesen's charts are more than just a republication of the text of the government's procedures. Jeppesen converts a government procedure from text into graphic form and represents that the chart contains all necessary information. For example, Jeppesen's catalog contains the following statements:

> When pilots compare approach plates . . . for information, for readibility . . . they choose Jeppesen. Why? Because the format of Jeppesen charts was designed by pilots, for pilots, and

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*sen v. Clay Adams, Inc.*, 12 Cal. App. 3d 1062, 1078, 91 Cal. Rptr. 319, 329 (1970); *see* 1 L. Frumer & M. Friedman, *Products Liability* § 6.01[1] (1984). The failure of the manufacturer to warn consumers of defects of which the manufacturer is or should be aware constitutes negligence. *Lunghi v. Clark Equipment Co.*, 153 Cal. App. 3d 485, 491-95, 200 Cal. Rptr. 387, 389-92 (1984); *Putensen*, 12 Cal. App. 3d at 1076-77, 91 Cal. Rptr. at 328; *see* 1A L. Frumer & M. Friedman, *supra*, § 8.01.

> has been time-tested and proven by instrument pilots throughout the world. Every necessary detail is clearly indicated....
>
> Jeppesen approach plates include ... EVERYTHING you need for a smooth transition from enroute to approach segment of your flight.

It is true that the government's procedures are significant components of Jeppesen's charts. It is apparent, however, that Jeppesen's charts are more than a mere republication of the government's procedures. Indeed, Jeppesen's charts are distinct products. As the manufacturer and marketer of those products, Jeppesen assumed the responsibility for insuring that the charts are not unreasonably dangerous in their intended use.

Jeppesen also claims a privilege under Cal. Civ. Code § 47(4). Section 47(4) only applies to reports in a "public journal." Jeppesen's charts are not a public journal.

C. *Prejudgment Interest*

1. *Right to a Jury Trial*

Jeppesen contends that the district court's award of prejudgment interest to the plaintiffs violated its right to a jury trial. Jeppesen notes that Cal. Civ. Code § 3288 leaves the decision to award prejudgment interest to the jury. The district court, however, based its award on Cal. Civ. Code § 3287(a), which does not require a jury determination. The availability of prejudgment interest under Section 3287(a) is primarily a question of law. As discussed below, we agree with the district court's conclusion that the plaintiffs were entitled to an award of prejudgment interest as a matter of law.

2. *Availability of Prejudgment Interest*

Section 3287(a) provides, in pertinent part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to recover interest thereon from that day." The plaintiffs claim that the value of the property damage to the aircraft was "capable of being made certain by

calculation." The district court agreed and awarded prejudgment interest.

In order for damages to be "certain," it is not necessary that they be liquidated. All that is required is established or reasonably ascertainable market prices or values for the property destroyed. *Lineman v. Schmid,* 32 Cal. 2d 204, 212, 195 P.2d 408, 413 (1948). The fact that the plaintiff prays for an amount in excess of the actual award does not render damages uncertain. *Ferro v. Citizens National Trust & Savings Bank,* 44 Cal. 2d 401, 415-16, 282 P.2d 849, 857 (1955); *National Farm Workers Service Center, Inc. v. Caratan,* 146 Cal. App. 3d 796, 811, 194 Cal. Rptr. 617, 627 (1983).

In this case, the damages related to the destruction of the aircraft consist of four components: (1) the base value of the aircraft, (2) the value of a spare parts kit and other material aboard the aircraft, (3) the cost of recovering the remains of those aboard the aircraft, and (4) the value of various specific features or "extras" on board the aircraft. The value of the first, second, and third components is undisputed. The experts disagreed only on the value of the fourth component. Thus, the following damages were undisputed:

| | |
|---|---|
| Destruction of the aircraft | $9,000,000 |
| Spare parts kit, etc. | 253,420 |
| Expenses to recover remains | 27,575 |
| Total | $9,280,995 |

The jury awarded $9.3 million, which was only $19,005 more than the undisputed total. $9.3 million is also the figure suggested by Jeppesen's counsel in closing argument.

We agree with the district court's conclusion that the damages were certain. The mere fact that the amount of damages was in dispute is not dispositive. *Esgro Central, Inc. v. General Insurance Co.,* 20 Cal. App. 3d 1054, 1062-63, 98 Cal. Rptr. 153, 158 (1971). The only disputed issue was the value of the "extras." Even though the jury evidently rejected the plaintiffs' contentions regarding the "extras," the remaining components had reasonably ascertainable market values. Accordingly, the damages were suffi-

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ciently certain to justify an award of prejudgment interest. *See Caratan*, 146 Cal. App. 3d at 811, 194 Cal. Rptr. at 857.

## III

## *CONCLUSION*

The judgment of the district court is AFFIRMED.[13]

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[13] Jeppesen's motion to strike portions of the excerpts of record is denied.

Supreme Court, U.S.
FILED
NOV 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-742

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

JEPPESEN & COMPANY,
*Petitioner,*

VS.

BARBARA A. BROCKLESBY, et al.,
and the UNITED STATES OF AMERICA,
*Respondents.*

## SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## Appendix C

United States District Court
Northern District of California

No. C-74-1874-SC

Barbara A. Brocklesby,
Plaintiff,

vs.

Jeppesen & Company, et al.,
Defendants.

No. C-74-1875-SC

Nancy Evans, Kathryn Evans, and Frank Evans,
Plaintiffs,

vs.

Jeppesen & Company, et al.,
Defendants.

No. C-74-1913-SC

Norma Lee Mobley Chapman,
Special Administratrix of the
Estate of Scott Chapman, Deceased,
Plaintiff,

vs.

Jeppesen & Company, et al.,
Defendants.

Fireman's Fund Insurance Companies
Lien Claimant.

C-2

No. C-75-0389-SC

Nancy Evans, Kathryn Evans,
and Frank Evans,
Plaintiffs,

vs.

United States of America,
Defendant.

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No. C-75-1069-SC

Norma Lee Mobley Chapman,
Special Administratrix of the
Estate of Scott Chapman, Deceased,
Plaintiff,

vs.

United States of America,
Defendant.

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No. C-75-1937-SC

Barbara A. Brocklesby,
Plaintiff,

vs.

United States of America,
Defendant.

---

No. C-76-0161-SC

World Airways, Inc.,
Plaintiff,

vs.

United States of America,
Defendant.

# JUDGMENT

[Filed July 25, 1983]

In accordance with the verdicts of the jury rendered herein in favor of plaintiffs and against Jeppesen & Company and in accordance with the order of this court awarding prejudgment interest, it is hereby ordered, adjudged, and decreed that:

(1) Plaintiff World Airways recover of the defendant Jeppesen & Company the sum of $9,300,000.00 together with prejudgment interest thereon from May 8, 1974 to date;

(2) Plaintiff Barbara Brocklesby recover of the defendant Jeppesen & Company the sum of $575,000.00;

(3) Plaintiff Norma Lee Mobley Chapman recover of the defendant Jeppesen & Company the sum of $750,000.00;

(4) Plaintiff Nancy Evans recover of the defendant Jeppesen & Company the sum of $980,000.00;

(5) Plaintiff Frank Evans recover of the defendant Jeppesen & Company the sum of $25,000.00;

(6) All plaintiffs recover of defendant Jeppesen & Company their costs of suit;

(7) Postjudgment interest accrue on each of the above items until paid.

Dated: July 25, 1983.

/s/ SAMUEL CONTI
United States District Judge

## Appendix D

United States District Court
Northern District of California

No. C-74-1874-SC

Barbara A. Brocklesby,
Plaintiff,

vs.

Jeppesen & Company, et al.,
Defendants.

No. C-74-1875-SC

Nancy Evans, Kathryn Evans, and Frank Evans,
Plaintiffs,

vs.

Jeppesen & Company, et al.,
Defendants.

No. C-74-1913-SC

Norma Lee Mobley Chapman,
Special Administratrix of the
Estate of Scott Chapman, Deceased,
Plaintiff,

vs.

Jeppesen & Company, et al.,
Defendants.

Fireman's Fund Insurance Companies
Lien Claimant.

D-2

No. C-75-0389-SC

Nancy Evans, Kathryn Evans,
and Frank Evans,
Plaintiffs,

vs.

United States of America,
Defendant.

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No. C-75-1069-SC

Norma Lee Mobley Chapman,
Special Administratrix of the
Estate of Scott Chapman, Deceased,
Plaintiff,

vs.

United States of America,
Defendant.

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No. C-75-1937-SC

Barbara A. Brocklesby,
Plaintiff,

vs.

United States of America,
Defendant.

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No. C-76-0161-SC

World Airways, Inc.,
Plaintiff,

vs.

United States of America,
Defendant.

# AMENDED JUDGMENT

[Filed Aug. 12, 1983]

In accordance with the verdicts of the jury rendered herein in favor of plaintiffs and against Jeppesen & Company and in accordance with the July 25, 1983 order of this court awarding prejudgment interest and the August 11, 1983 order of this court disposing of all parties post-trial motions, it is hereby ordered, adjudged, and decreed that:

(1) Plaintiff World Airways recover of the defendant Jeppesen & Company the sum of $5,811,250.00 together with prejudgment interest on $9,300,000.00 from May 8, 1974 to July 25, 1983 in the amount of $6,155,580.81;

(2) Plaintiff Barbara Brocklesby recover of the defendant Jeppesen & Company the sum of $201,250.00;

(3) Plaintiff Norma Lee Mobley Chapman recover of the defendant Jeppesen & Company the sum of $262,500.00;

(4) Plaintiff Nancy Evans recover of the defendant Jeppesen & Company the sum of $330,000.00;

(5) Plaintiff Frank Evans recover of the defendant Jeppesen & Company the sum of $25,000.00;

(6) All plaintiffs recover of defendant Jeppesen & Company their costs of suit;

(7) Postjudgment interest accrue as of July 26, 1983 on each of the above items until paid.

Dated: August 11, 1983.

/s/ SAMUEL CONTI
United States District Judge

## Appendix E

United States District Court
Northern District of California

No. C-74-1874-SC

Barbara A. Brocklesby,
Plaintiff,

vs.

Jeppesen & Company, et al.,
Defendants.

No. C-74-1875-SC

Nancy Evans, Kathryn Evans, and Frank Evans,
Plaintiffs,

vs.

Jeppesen & Company, et al.,
Defendants.

No. C-74-1913-SC

Norma Lee Mobley Chapman,
Special Administratrix of the
Estate of Scott Chapman, Deceased,
Plaintiff,

vs.

Jeppesen & Company, et al.,
Defendants.

Fireman's Fund Insurance Companies
Lien Claimant.

No. C-75-0389-SC

Nancy Evans, Kathryn Evans,
and Frank Evans,
Plaintiffs,

vs.

United States of America,
Defendant.

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No. C-75-1069-SC

Norma Lee Mobley Chapman,
Special Administratrix of the
Estate of Scott Chapman, Deceased,
Plaintiff,

vs.

United States of America,
Defendant.

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No. C-75-1937-SC

Barbara A. Brocklesby,
Plaintiff,

vs.

United States of America,
Defendant.

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No. C-76-0161-SC

World Airways, Inc.,
Plaintiff,

vs.

United States of America,
Defendant.

E-3

## ORDER RE POST-TRIAL MOTIONS

[Filed Aug. 11, 1983]

These consolidated actions all arise out of the crash of a World Airways DC-8 cargo aircraft during an instrument approach to Cold Bay, Alaska, on September 8, 1973. Plaintiffs are World Airways and the heirs of three individuals who died in the crash. Defendants are the United States government and Jeppesen & Company, the publisher of the instrument approach chart being used by the World Airways crew at the time of the crash. Plaintiffs' claims against Jeppesen were tried before a jury and a verdict for plaintiffs rendered therein on June 27, 1983. On July 14, 1983 plaintiffs settled their claims against the government. In accordance with the verdict of the jury and the July 25, 1983 order of this court awarding plaintiff World Airways prejudgment interest, judgment was entered in favor of plaintiffs and against Jeppesen on July 26, 1983. Several post-trial motions are now before the court. The motions will be disposed of as set forth below.

### Jeppesen's motion to amend judgment

By this motion, Jeppesen seeks to have the judgment against it reduced to reflect the amounts that plaintiffs have received in settlement of their claims against the government. The settlement, which is for a total of $5,000,000, allocates $3,488,750 to World Airways, $650,000 to Nancy Evans, $487,500 to Lee Chapman, and $373,750 to Barbara Brocklesby. Plaintiffs concede that under section 877(a) of the California Code of Civil Procedure, Jeppesen is entitled to a judgment credit in the above amounts.

Jeppesen also argues, however, that this credit should be deducted prior to rather than after the computation of prejudgment interest on World Airways' award. The court disagrees. The purpose of prejudgment interest is to ensure that a damaged party is fully compensated for his loss. *In re Pago Pago Aircrash of January 30, 1974,* 525 F. Supp. 1007, 1013-15 (C.D. Cal. 1981). The purpose of section 877(a) is to prevent a double recovery for the same loss. *Vessey v. United States,* 626 F.2d 627, 633 (9th

Cir. 1980). These purposes are complementary, not contradictory. Thus section 877(a) was not intended to prevent a damaged party from fully recovering for his loss once, nor was it intended to limit the extent of a party's otherwise compensable injury. Cal. Code Civ. P. § 375(g). Therefore, because World Airways did not receive any settlement funds prior to the entry of the judgment against Jeppesen, its compensable injury properly includes the loss of prejudgment interest on the full amount of the jury verdict in its favor.

The cases relied on by Jeppesen are not to the contrary. In *Coleman Engineering Co. v. North American Aviation, Inc.*, 65 Cal.2d 396 (1966), the plaintiff was a general contractor whose original claim for damages included claims that had been asserted against it by non-party subcontractors. When plaintiff settled some of these claims for less than the amounts originally demanded, the amount of the actual injury it suffered was correspondingly reduced. Because these settlements had reduced the plaintiff's injury, prejudgment interest on this reduced amount was sufficient to fully compensate plaintiff for its loss. *Id.* at 409. Similarly, in *Leaf v. Phil Rauch, Inc.*, 47 Cal.App.3d 371 (1975), plaintiff's claim for damages was reduced by defendant's setoff prior to computation of prejudgment interest because the setoff reduced to [sic] amount of plaintiff's actual injury. *Id.* at 376. Thus neither case is applicable to the circumstances currently before the court. Jeppesen will therefore be given a credit on the judgment against it, but this credit will be deducted after the computation of prejudgment interest on World's award.

**World Airways' motion to amend judgment**

By this motion, World Airways asks the court to compute the exact amount of prejudgment interest that accumulated during the period of May 8, 1974 to July 25, 1983, which is the period for which the court has already awarded prejudgment interest. Using the formula set forth in *In re Pago Pago Aircrash of January 30, 1974*, 525 F. Supp. 1007, 1021 (C.D. Cal. 1981), the court has computed prejudgment interest and finds it to be $6,155,580.81. The judgment will be amended accordingly.

**Jeppesen's motion to enforce written settlement agreement and for judgment of indemnity**

By this motion, Jeppesen seeks entry of a judgment of indemnity in its favor and against the government. The motion is based upon a written indemnity agreement which was entered into by Jeppesen and the government shortly before trial of this matter began. The agreement provides that the government will indemnify Jeppesen to the extent that Jeppesen is found liable on any theory for publishing an instrument approach procedure that was defectively designed by the government. The agreement further provides that special interrogatories will be submitted to the jury in order to determine the extent of the government's liability under the agreement or, in lieu of special interrogatories, that the matter could be submitted to the trial judge.

Although these actions had been pending for 8 to 9 years, the existence of the indemnity agreement became known to the court only on the eve of trial. Jeppesen had never filed a cross-claim for indemnity. Thus neither the agreement nor the proposed special interrogatories ever became a part of this action. The court felt that it would be unfair to the plaintiffs to present an entirely new matter to the jury in the form of special interrogatories when this matter was not within the claims or purview of the plaintiffs' case. Moreover, the court felt that both the special interrogatories and the portion of the agreement on which they were based was framed in language that would be confusing to the jury and likely to affect their understanding of the plaintiffs' case. In sum, instead of filing a cross-claim or separate action for indemnity against the government, Jeppesen proceeded on its own, outside the rules of pleading, and without the court's prior knowledge or consent agreed that either the court or jury would decide certain questions not otherwise a part of this action. Thus the court refused to allow Jeppesen to submit the proposed special interrogatories to the jury, and declined to allocate fault between Jeppesen and government itself. In its motion, Jeppesen seeks not only reconsideration of the court's prior refusal to decide what portion of the judgment against Jeppesen should be paid by the government under the indemnity agreement, but also entry of a

final judgment of indemnity in its favor in accordance with whatever allocation of damages the court finds proper.

Initially, the court finds that the judgment Jeppesen seeks is not within the court's power to enter. Entry of judgment would require a full adjudication of the enforceability of the indemnity agreement, and its enforceability is at least open to question. For example, under section 877(b) of the California Code of Civil Procedure, a good faith settlement is a defense to a claim for indemnity by a non-settling joint tortfeasor. *American Motorcycle Association v. Superior Court,* 20 Cal.3d 578, 604 (1978). Whether the settlement between plaintiffs and the government is in good faith and whether the government intended to waive a section 877(b) defense in signing the indemnity agreement are thus issues that must be decided prior to entry of any judgment in Jeppesen's favor. But like the issue of the proper allocation of fault between Jeppesen and the government, these issues are not properly before the court. No complaint presenting these issues has been filed, no answer given, no discovery conducted and no evidence taken. These procedures are necessary prerequisites under the Federal Rules of Civil Procedure to the entry of the judgment Jeppesen seeks.

The only precedent for entry of judgment in circumstances similar to those presented on this motion is *Gregory v. Hamilton,* 77 Cal.App.3d 213 (1978). In that case, the California Court of Appeal held that under the California Rules of Civil Procedure, a judgment could be entered upon a motion to enforce a settlement agreement when the settlement resolved a claim that had been actually filed in the action and which was in fact the entire subject matter of the lawsuit. *Id.* at 218-21. Jeppesen, however, has not filed any claim for indemnity against the government in this court or in any other. Thus even assuming that a similar procedure for enforcing settlements was available under the Federal Rules of Civil Procedure, the circumstances of this case would render it inapplicable.

Finally, the court will also deny Jeppesen's request for reconsideration of the court's refusal to make the factual finding contemplated by the indemnity agreement allocating fault between Jeppesen and the government. In addition to those reasons

stated by the court in its original decision not to become a participant in this as yet not judicially cognizable dispute, the government has now relied on the court's original decision by entering into a settlement with plaintiffs. Thus reconsideration of the court's original decision would be especially inappropriate. Jeppesen's motion to enforce the indemnity agreement and for entry of a judgment of indemnity will therefore be denied in its entirety.

**Jeppesen's motion for a new trial**

Having carefully reviewed Jeppesen's motion for a new trial, the court finds the arguments made therein to be without merit. Accordingly, the motion will be denied. In light of the denial of Jeppesen's motion for a new trial, Jeppesen's request for a stay pending disposition of its new trial motion is now moot.

In accordance with the foregoing, it is hereby ordered that:

(1) Judgment in this action be amended to reflect the amounts plaintiffs have received in settlement of their claims against the government and to state the amount of prejudgment interest awarded to World Airways as $6,155,580.81;

(2) Jeppesen's motion to enforce written settlement agreement and for judgment of indemnity be denied;

(3) Jeppesen's motion for a new trial be denied; [sic]

Dated: August 11, 1983.

/s/ SAMUEL CONTI
United States District Judge

(3)

Supreme Court, U.S.
FILED
DEC 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-742

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

JEPPESEN & COMPANY,
*Petitioner,*

VS.

BARBARA A. BROCKLESBY, et al.,
and the UNITED STATES OF AMERICA,
*Respondents.*

## BRIEF OF BARBARA BROCKLESBY, ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether this Court should consider the First Amendment issue raised in the Petition for Certiorari when it was neither raised in the District Court nor decided by the Court of Appeal.

2. Whether the First Amendment prohibits state regulation, in the form of imposition of tort liability for damages, of defective aviation charts which cause injury to person and property.

3. Whether in a tort action further proceedings are rendered moot by payment of the underlying judgment by the defendant's insurance carriers in exchange for satisfaction of judgment.

4. Whether a judgment in a diversity case based on a general verdict supported by alternative theories of liability should be affirmed in conformity with state rules of appellate review where sustainable by any one or more of the alternative theories.

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No. 85-742

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

JEPPESEN & COMPANY,
*Petitioner*,

VS.

BARBARA A. BROCKLESBY, et al.,
and the UNITED STATES OF AMERICA,
*Respondents*.

## BRIEF OF BARBARA BROCKLESBY, ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## INTRODUCTION

Respondents Barbara A. Brocklesby, Nancy Evans, Estate of Frank Evans, Norma Lee Mobley Chapman and World Airways, Inc. respectfully pray that this Court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 2, 1985, for the following reasons:

1. Jeppesen waived its First Amendment objection by failing to raise it in the District Court, thereby precluding plaintiffs from presenting evidence on the issue and requesting a special verdict, and the Ninth Circuit declined to decide the issue.

2. First Amendment protection does not apply to navigation charts because they are directions and invitations to action on a matter of purely private concern, similar to commercial speech. As such they are subject to reasonable state regulation in the form of strict liability for injuries caused by defects in aviation charts.

3. The case is moot because Jeppesen's insurance carriers have paid off the judgments and settled the cases in exchange for complete satisfaction of judgment.

4. In this diversity action, the Court must apply the California rule that a general verdict supported by alternative theories must be affirmed if any of the alternative theories is without error.

## PROCEEDINGS BELOW

The Ninth Circuit affirmed judgment against petitioner Jeppesen & Company ("Jeppesen") and for plaintiffs/respondents ("plaintiffs") on a general jury verdict after a 49 day trial for the deaths of the crew members and the destruction of World's DC-8 cargo airplane. The case was tried, and the District Court instructed the jury, on three theories of liability: negligence, breach of express or implied warranty, and product liability. Jeppesen did not object on First Amendment or on any other grounds to the strict liability instructions as it was required to do. F.R. Civ. P. 51. The liability theories were based on substantial evidence of defects in petitioner's chart, of which Jeppesen failed to warn, so that the chart failed to provide information necessary to guide the

aircraft safely to a landing. Plaintiffs also sued the United States ("the Government") under the Federal Tort Claims Act (28 U.S.C.A. § 2671, et seq.) claiming that the instrument approach procedure designed by the Federal Aviation Administration ("FAA") was in violation of its own standards and criteria for such procedures. The cases were tried simultaneously, the diversity action against Jeppesen being heard by a jury and the FTCA action against the Government being heard by the Court. The United States at no time claimed an immunity.

Following the jury verdict against petitioner, but before the District Court had ruled on the FTCA case, plaintiffs settled with the Government for Five Million Dollars. Jeppesen received a credit in the amount of the settlement. Jeppesen currently possesses a claim against the Government for indemnity of the balance of the judgment, which the Ninth Circuit ruled must be presented before the United States Court of Claims. Jeppesen Petition Appendix B at 7.

After affirmance of the judgment by the Ninth Circuit, Jeppesen's three liability insurance carriers paid the judgment piecemeal in proportion to their obligations to Jeppesen. All the funds have been disbursed to plaintiff heirs and World Airways. Not until the last payment of approximately 9% of the judgment plus interest did Jeppesen attempt to claim its payment was "without prejudice" to further appellate review. Moreover, despite such claim Jeppesen submitted, and plaintiffs acknowledged, a "complete and full satisfaction of said judgment."

## STATEMENT OF THE CASE

### I. Defects in Jeppesen's Chart Caused the Crash

World 802 was on a contract cargo flight from Travis Air Force Base, California, to the Phillippines with an intermediate stop at Cold Bay, Alaska.[1] It was flying on a Doppler flight plan (that is, without the assistance of any land-based navigational aids) and

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[1] RT 3370:16-3371:6 In this brief the following abbreviations are used: RT (Reporter's Transcript), ER (Appellant's Excerpt of Record), 2 ER (Plaintiffs' Excerpt of Record).

was over water from the time it left California until it neared Cold Bay.[2]

The crash occurred on September 8, 1973, at 5:42 a.m. while World 802 was in a transition stage of flight[3] between enroute and the beginning of an instrument approach in clouds and darkness for landing. Unable to see anything outside the cockpit, the crew was flying the aircraft solely on instruments[4] and was using Jeppesen's Approach Chart for guidance.

The crew executes an instrument approach procedure ("IAP") based on radio signals from navigational aids known as a "VORTAC" and a Localizer. The VORTAC facility transmits two items of information to the aircraft. First, it sends out 360 radio signals known as "radials", like spokes of a wheel.[5] From these, aircraft instruments show which radial or compass degree the aircraft is on in relation to the VORTAC.[6] Second, the VORTAC sends out information received by the aircraft's distance measuring equipment ("DME"), revealing the aircraft's distance in nautical miles from the station.[7] The localizer directional beam is picked up by the aircraft[8] and a needle on a cockpit instrument will start to move toward the center as the aircraft gets close to the localizer course.[9] The crew then turns the aircraft inbound and follows the localizer in to the runway.[10]

After an air traffic control clearance, the crew began a descent from its enroute altitude of 31,000' to one of 3,500', the prescribed

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[2] RT 3370:16-24.

[3] RT 3397:1-6; 3398:13-20.

[4] RT 2529:2-4; 2532:16-24.

[5] RT 1055:24-1056:7; 2360:17-21.

[6] RT 2360:21-25; 2361:1-20.

[7] RT 2534:13-21.

[8] ER 47:4-7.

[9] RT 2360:7-16.

[10] RT 2477:19-22.

initial approach altitude for intercepting the localizer course between 40 and 19.5 DME.[11] Erroneous navigational signals from the VORTAC falsely led the crew to believe it was flying over water, some 40-80 miles south of its actual course, rather than over rugged, mountainous terrain.[12]

About 40 miles out, at a critical portion of the flight, the crew lost the DME signal and thus did not know the aircraft's distance from the station.[13] Although, the signal returned at 29 DME,[14] shortly thereafter a "false" localizer signal from the transmitting facility indicated to the captain that he was intercepting the localizer back course approach. He therefore began a right turn to proceed inbound on the localizer center line.[15] Second later, World 802 crashed into 4,961-foot Mt. Dutton at about the 3,500-foot level, some 18 miles east of the Cold Bay VORTAC.[16]

The evidence proved that the procedure on Jeppesen's chart was defective for (1) lack of a DME arc, feeder route, or other transition at an appropriate altitude from the enroute phase to the IAP, (2) designation of an altitude at the intial approach fix of 3,500', which was 2,000' below the minimum altitude in that area for reception of useable VORTAC signals. (3) In addition, the chart itself was defective for failure to warn of these defects.

Instrument approach procedures are required by law to conform to the criteria contained in the United States Standards for Terminal Instrument Procedures ("TERPS"),[17] as was acknowledged by the President of Jeppesen,[18] who was familiar with the

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[11] ER 46:4-9; 4611-13; RT 2606:5-20; 506:9; 507:21; 509:16-19.

[12] RT 583:6-18; 583:24-584:14; 587:9-589:2; 594:10-596:12; 2561:18-2563:6; 2494:3-18; 2460:9-21.

[13] RT 2144:10-2145:4; 2471:23-2473:16.

[14] RT 2609:24-2610:1; 3726:16; 3728:8.

[15] RT 2476:11-2479:18.

[16] ER 47:24-28.

[17] 14 C.F.R. § 97.20.

[18] RT 2872:1-3.

manual, as were Jeppesen employees who attended an FAA course on TERPS criteria and standards.[19] The first two defects violated TERPS requirements.[20] The manual states in Section 1:

> This handbook contains criteria which will be used to formulate, review, approve, and publish a procedures for instrument approach and departure of aircraft to and from civil and military airports . . . .[21]

The IAP was formulated by the Government, and reviewed and published in graphic form by Jeppesen. This is the "law" for which Jeppesen claims First Amendment immunity from strict liability, even though defects in the procedure and Jeppesen's failure to warn of them caused death and destruction. The "law" is a verbal description of an instrument approach procedure on a FAA form 8260-5.[22] Jeppesen takes these words and numbers and it illustrates them graphically on its chart,[23] just as does the United States Coast and Geodetic Survey in a different format, and as anyone in free to do. This chart is copyrighted and contains Jeppesen's corporate logo. Jeppesen charges Colorado sales tax[24] and refers to its charts in its internal manuals and advertising materials as "products".[25] As shown above, the IAP illustrated on Jeppesen's chart did not comply with TERPS criteria as required by law. In other words, the IAP was itself in violation of Government regulations.

### A. The Absence of a Transition

Prior to the accident, an FAA procedure specialist originally proposed a 40 DME transition arc with an 8,000 foot altitude

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[19] RT 2867:9-18.

[20] RT 4100:5-19; 1984:4-1985:1; 2 ER 14.

[21] 2 ER 2.

[22] RT 2819:13. A copy of the procedure incorporated by reference in the Federal Register is attached as Appendix A.

[23] RT 2872:1-8. A copy of the chart is attached as Appendix B.

[24] RT 2584:10-17.

[25] RT 2584:1-9; 2 ER 64, 79, 81, 113.

restriction, but it was deleted before the procedure was published.[26] Such an arc would have kept World 802 40 miles away from the VORTAC at an altitude of 8,000 feet, 20 miles from and substantially above Mt. Dutton.[27] Following the crash, a 30 DME transition arc was incorporated into the approach procedure.[28] Ironically, for years prior to the crash Jeppesen had published charts depicting instrument approches on the opposite end of the same runway at Cold Bay containing DME transitional arcs.[29]

The evidence established that in designing IAPs the FAA was also required to follow the provisions of the Flight Procedures and Airspace Handbook ("FPA Handbook").[30] Both the FPA Handbook and the TERPS Manual required that IAPs contain transitions between the enroute structure and the final approach. The FPA Handbook set forth the following requirement:

> Instrument approach procedures should provide a smooth transition from the enroute structure and provide the pilot with sufficient information to effect a safe and expeditious approach.[31]

TERPS also required that "feeder routes which provide an operational advantage shall be established and published," and "[p]ositive course guidance shall be provided for feeder routes."[32]

The 40 DME transition arc proposed but never adopted would have satisfied this requirement;[33] instead—in violation of FAA

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[26] RT 944:25-949:8; 953:23-954:23; 959:16-969:24; 961:13-963:13; 967:14-24; 969:13-25; 1031:20-1032:1; 1042:14-18; 1044:25-1047:1.

[27] RT 972:1-974:2; 1040:1-1041:16; 1079:2-25; 1639:7-1640:17; 2615:8-2616:14.

[28] RT 1250:25-1252:13; 1254:1-16; 1370:23-1373:3. This post-accident IAP was depicted on a subsequent Jeppesen chart, Appendix C.

[29] RT 1032:2-1035:19; 1040:14-21; 1216:19-1217:12, ER 7-8, 23.

[30] RT 1016:11-18.

[31] 2 ER 11.

[32] 2 ER 4, 5.

[33] RT 1031:20-1032:1.

requirements—no transition was provided. William Bersch, head of the FAA's Flight Procedure Unit at the time of the accident, stated that he studied the back course IAP after the crash and found there was a "gap" between the enroute and terminal phases of flight because there was no transition.[34]

### B. The Conflict Between Initial Approach Fix Altitude and Minimum Altitude for Reception of Navigational Signals

The second defect in the procedure on Jeppesen's chart was that it showed an altitude for intercepting the initial segment of the localizer course of 3,5000', which was 2,000' below the minimum altitude necessary for receiving signals from the VORTAC. The Cold Bay VORTAC was not useable at altitudes below 5,500' for aircraft 40 miles or more from the station. This permanent facility restriction was contained in a Notice to Airmen published by the FAA in its Alaska Supplement,[35] source material utilized by Jeppesen when analyzing a procedure before its publication.[36]

The specification of an initial approach fix altitude 2,000' below the facility useability restriction was in violation of Section 214.32014 of the United States Standard Flight Inspection Manual, which requires a review of facility restrictions to determine that procedural use is not authorized within any unuseable portions of associated facilities.[37]

Mr. Rosenkrans, Jeppesen's President, admitted these defects in Jeppesen's chart when he testified that "the pilot of World 802 was not provided a pre-determined routing" such as a transition arc from the enroute to the instrument approach procedure "to provide for adequate radio reception and for terrain clearance.[38]

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[34] RT 4100:5-19.

[35] RT 1380:23-1381:1; 4103:3-4105:25; 2 ER 165-170.

[36] RT 2840:25; 2 ER 94; 2838:21-2840:2.

[37] 2 ER 14; RT 1984:4-1985:1.

[38] RT 2815:8-23.

He further admitted that the chart did not show the 5,500' minimum reception altitude for radio signals 40 miles from the Cold Bay transmitter.[39] Instead, the chart indicated the plane could descend to 3,500' at 40 miles from the airport transmitter.

### C. The Absence of a Warning

Jeppesen's chart failed to provide warnings of any kind concerning the absence of a transition arc and the conflict between the initial approach fix altitude and the minimum VORTAC reception altitude, despite the fact that Jeppesen had the ability and authority to do so and should have added such warnings to the chart.

Had Jeppesen's chart contained a transition arc at a safe altitude and distance from terrain, had it contained an initial approach fix altitude which did not conflict with the minimum signal reception altitude, or had it at least warned of these defects, World 802 would not have desecended below 5,500' until it was on the localizer course and would not have crashed into Mt. Dutton.[40]

## II. Theories of Liability Against Jeppesen at Trial

Plaintiff introduced evidence on three theories of liability against Jeppesen at trial: breach of warranty, negligence and strict product liability. The jury was fully instructed on each theory.[41]

### A. Breach of Warranty

Plaintiffs contended at trial that Jeppesen expressly and impliedly warranted that its charts were free of defect and contained everything a pilot needed to make a safe approach and landing,

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[39] RT 2849:13.

[40] RT 3984:9-14; 3955:1; 750:5-8; 1987:7-24; 2614:15-2616:25; 3561:5-3562:20.

[41] Jeppesen's First Amendment challenge is directed solely to strict liability, and the Ninth Circuit's affirmance of the judgment was proper in this diversity action because under California law a general verdict must be affirmed if supported by any error-free theory such as breach of warranty or negligence. See Part IV of this brief.

that World Airways relied on these warranties in subscribing to the charts and that publication of the defective chart in this case constituted a breach of the warranty which proximately caused plaintiffs' injuries.

Jeppesen & Company is the "publisher" or "manufacturer" of international aeronautical charts and maps. Jeppesen describes itself as a supplier of "quality products" containing "[c]urrent, accurate data."[42]

Jeppesen advertised it charts as:

> [T]ime-tested and proven by instrument pilots throughout the world. Every necessary detail is clearly indicated .... Jeppesen approach plates include: ... EVERYTHING you need for a smooth transition from enroute to approach segment of your flight.[43]

Jeppesen's literature also claimed:

> Every necessary detail is clearly indicated. Information is located in one place to eliminate the necessity of searching through several sources.[44]

World's personnel relied upon these warranties in subscribing to Jeppesen's materials.[45]

Jeppesen breached its warranty by publishing a chart with an approach procedure that in fact did not provide "EVERYTHING" a pilot needed from enroute flight to the approach segment for landing.

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[42] 2 ER 114.

[43] 2 ER 111, 118.

[44] 19 2812:1-4; 2 Er 118.

[45] RT 3850:4-3851:1, 5-16. Jeppesen did not object to the instructions on express warranty, and does not complain of them in its petition for certiorari, even though liability for express warranty is just as "strict" as products liability in that no showing of fault is necessary.

**B. Negligence**

Plaintiffs contended that Jeppesen was negligent in failing to recognize the defects in the Government's approach procedure, failing to bring them to the attention of the FAA and failing to warn pilots of the defects.

Jeppesen recognized the need and assumed responsibility for publishing safe instrument approach charts. Its President, Mr. Rosenkrans, testified that because a crew flying under instrument conditions in bad weather at night does not have the time nor the necessary information to determine safe altitudes, reception altitudes, or a transition from the enroute to the airport approach,[46] Jeppesen's Production Specifications Manual required that its charts contain "built-in safety factors" to assist the crew under difficult conditions:

> The increase in instrument navigation and the need to maintain an all-weather flying capability also bear on the requirement of charts of high quality. This is even more apparent when considering the psychological factors of instrument flying, frequently conducted under adverse weather conditions. The inability to observe first-hand all the forces that bear on the aircraft in flight and the limited time available in which critical decisions must be made, contribute to the requirement for optimum presentation of information. Therefore, the charts we produce, including associated tabulated aeronautical data, should contain built-in safety factors that preclude ambiguity and misinterpretations and provide for rapid identification of correct information. Of all the elements involved, accuracy of data cannot be overemphasized.[47]

Jeppesen's First Amendment argument ignores Jeppesen's ability to warn of defects in the FAA approach procedure, to add information on its charts in addition to the FAA approach procedure, and to advise and influence the FAA to make necessary changes in the approach procedures it published. The prem-

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[46] RT 2830:19; 2831:6.

[47] ER 89, RT 2834:4-21.

ise of Jeppesen's argument is that it merely published the FAA procedure which was beyond it's control. This premise is false. Jeppesen's chart contained much more information than the FAA approach procedure and Jeppesen did, in fact, have substantial influence with the FAA to improve the safety of the procedure.

Jeppesen is authorized to, and does provide information on the chart beyond that contained in the procedure.[48] Such additional data includes communications frequencies, an airport diagram, runway number, length, width, surface and taxiways, lighting aids, Morse code identification and minimum off-route altitudes.[49] As a private company, Jeppesen can print as much or as little as it wishes.[50] Jeppesen had no contract with the United States and was free to publish FAA procedures in any manner it pleased. Jeppesen obtains this additional information from other sources,[51] including, but not limited to, the Federal Aviation Administration.

Although the FAA designed the instrument approach procedure graphically depicted by Jeppesen, it was Jeppesen's responsibility to evaluate the adequacy of the procedure, to advise the FAA of defects and deficiencies in the procedure, and certainly to warn pilots of inadequacies in the procedure. Mr. Rosenkrans, Jeppesen's President, admitted that Jeppesen has an obligation to check the procedures before printing them for consistency, contradiction and accuracy as well as for any glaring or obvious omissions, transposition of figures, and "that type of thing."[52] Jeppesen directs its employees to check consistency, accuracy, and completeness of information supplied by the FAA.[53] This checking should have resulted in a warning on the chart, based on information in Jeppesen's possession that the minimum reception

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[48] RT 2879:4-14.

[49] RT 2879:4-14.

[50] RT 2881:1.

[51] RT 2880:15-23.

[52] RT 2867:3-8.

[53] RT 2837:5.

altitude restriction on the Cold Bay transmitter was 5,500, higher than Mt. Dutton[54] and 2,000' above the 3,500' initial approach fix altitude specified on Jeppesen's chart.

According to Jeppesen's Production Specifications Manual, Jeppesen employees in Washington should have brought this discrepancy, and the absence of a transition arc, to the attention of FAA officials. The Manual states that Jeppesen's Aviation Information Staff ("AIS") "is to resolve differences or apparent discrepancies in published information utilizing the most expedient and economical means available by contact with the official sources of such information.[55] Jeppesen had an office in Washington whose primary responsibility was to act as liaison with the FAA.[56] The Washington office makes corrections to the FAA approach procedure form and makes inquiries of the FAA so that everything that should have been on the chart would appear.[57] Jeppesen employees had in the past been successful in obtaining changes in FAA instrument approach procedures,[58] and Jeppesen had made contributions to FAA instrument approach procedures by "asking a question" that resulted in a change.[59] Thus, Jeppesen's Washington employee should have brought to the FAA's attention the need for (1) a transition arc at 40 miles from the transmitter requiring a minimum 5,500' altitude and (2) the discrepancy between the 3,500' initial approach fix altitude and the 5,500' minimum reception altitude.[60]

### C. Products Liability

Plaintiffs contended at trial that Jeppesen, as the manufacturer and seller of an aviation chart, was strictly liable for injuries

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[54] RT 439:5-440; 6; 9 RT 1134:8-1135:15.

[55] RT 2853:21-24; 2 ER 81.

[56] RT 2857:9-14.

[57] RT 2596:1-9.

[58] RT 2861:1-23.

[59] RT 2862:24-2863:13.

[60] RT 2591:22-2592:1; 2597:5-8; 2597:5-20.

caused by defects in the chart. Plaintiffs contended that the chart contained three such defects which are described in detail in subsection I of this section. The three defects were: (1) the absence of a transition in the instrument approach procedure between the enroute structure and final approach, (2) specification of an initial approach fix altitude for the instrument approach procedure which was 2,000' below the minimum signal reception altitude and (3) the absence of a warning as to the two defects in the approach procedure. It should be noted with regard to defect (3) that Jeppesen was free to add such a warning to its chart even though it could not add to or change the approach procedure depicted on the chart.[61]

The jury was fully instructed on all aspects of strict products liability, including the absence of a warning.[62]

## REASONS FOR DENYING THE WRIT

### I

### THE FIRST AMENDMENT ISSUE SHOULD NOT BE CONSIDERED BY THIS COURT SINCE IT WAS NEITHER RAISED BY JEPPESEN IN THE DISTRICT COURT NOR DECIDED BY THE NINTH CIRCUIT

Jeppesen attempts to advance on appeal an issue which it failed utterly to raise at any time during the nine years that this case was before the District Court. Jeppesen advanced it for the first time on appeal before the Ninth Circuit. That court rightly declined to reach the issue on the ground that Jeppesen had not properly preserved it. Jeppesen Petition, Appendix B at 9, fn. 9.[63]

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[61] RT 2866:17; 2879:4-14.

[62] RT 6232:16-6234:3.

[63] F.R. Civ. P. 51 requires a party to state specifically its objection to a jury instruction in order to complain of it on appeal; as the Ninth Circuit pointed out, Jeppesen failed to make an objection to the products liability instructions given in the trial court. Jeppesen Petition, App. B at 9, n. 9.

The opinions of this Court are legion in holding that the Court will not consider issues which were not raised or passed upon in the courts below. E.g., *Singleton v. Wulff,* 428 U.S. 106, 120 (1976); *Walters v. St. Louis,* 347 U.S. 231, 233 (1954); *Shelley v. Kraemer,* 334 U.S. 1, 8-9 (1948); *U.S. v. New York Tel. Co.,* 326 U.S. 638, 650, fn. 18 (1946); *Becker Steel Co. of America v. Cummings,* 296 U.S. 74, 82 (1935); *Virtue v. Creamery Package Mfg. Co.,* 227 U.S. 8, 38 (1913); *Wood v. Weimar,* 104 U.S. 786, 795 (1881); *Bartemeyer v. State of Iowa,* 85 U.S. 129, 137-138 (1873); *Tome v. Dubois,* 73 U.S. 548, 555 (1867); *Brockett v. Brockett,* 44 U.S. 691, 692 (1845).

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering,* 312 U.S. 552, 556, 85 L.Ed. 1037, 61 S.C. 719 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence.

*Singleton v. Wulff, supra,* 428 U.S. 106, 120; See, also, *Walters v. St. Louis, supra,* 347 U.S. 231, 233 ("Of course, we will not undertake to review what the court below did not decide.").

No general exception to this rule exists for constitutional claims. Indeed, this Court has in the past applied the rule in declining to review constitutional claims. *Shelley v. Kramer, supra,* 334 U.S. 1, 8-9: "The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue before this Court on appeal, was the validity of the covenant agreements as such," citing *Corrigan v. Buckley,* 271 U.S. 323, 330-331 (1926).

In addition to precluding plaintiffs from introducing relevant evidence, Jeppesen's failure to raise the issue in the District Court prejudiced plaintiffs by failing to alert them to the possible

necessity of a special verdict. At trial, plaintiffs advanced three distinct theories of recovery: negligence, breach of warranty and strict products liability. The issue raised by Jeppesen in its petition attacks only the third theory. Had that issue been raised in the District Court, plaintiffs clearly would have requested a special verdict, so that the judgment could be affirmed on either the negligence or breach of warranty theories, thereby rendering harmless any alleged error in the strict products liability theory.

In support of its conclusionary assertion that the "First Amendment is properly before this Court" (Jeppesen Petition at 6), Jeppesen cities *Hormel v. Helvering,* 312 U.S. 552, 555-59 (1941), and *Egan v. Teets,* 251 F.2d 571, 576 (9th Cir. 1957).

*Hormel* is inapposite. It arose out of a tax case tried before the Board of Tax Appeals. Appeal was to the Circuit Court of Appeals, whose authority to review the decision rested on a special tax statute allowing it to modify or reverse the decision with or without remanding the case, "as justice may require." 26 U.S.C.A. 1940 Ed. § 1141(c)(1). The Circuit Court, relying on a non-Constitutional theory advanced for the first time on appeal by the government, reversed the tax board's decision which had been in favor of the taxpayer.

Upon review, this Court first noted the general rule precluding review on appeal of issues not raised in the trial court. 312 U.S. at 556. However, relying upon the language of the special tax statute noted above, the Court held that the Circuit Court properly considered the theory not previously raised in the trial court.

Unlike *Hormel,* reviewing authority in the present case obviously was not premised on the special tax statute; furthermore, unlike *Hormel,* the Circuit Court in the instant case did *not* pass upon the issue raised in Jeppesen's petition.

The *Egan* case is equally inapplicable. That was a habeas corpus proceeding arising out of a criminal action. The petitioner, whose appeal in state court had been dismissed for lack of timely prosecution, contended that the dismissal resulted because the trial judge to whom he had delivered his handwritten notice of appeal had suppressed the notice in violation of the equal protection clause of the Fourteenth Amendment. The Ninth Circuit,

without citation to authority, stated that "a constitutional question may be raised at any time if the matter appears on the face of the record, or if it is of such nature that it could not have been raised before." 251 F.2d at 576. This rule contravenes the rule of waiver of constitutional issues established by this Court, at least in the context of civil actions. See *Shelley v. Kraemer, supra,* 334 U.S. at 8-9.

## II

## THE JUDGMENT FOR INJURIES CAUSED BY DEFECTS IN PETITIONER'S CHART DOES NOT RAISE SIGNIFICANT FIRST AMENDMENT ISSUES

### A. Jeppesen's Chart Is a Product, Not Speech

Jeppesen misframes the issue by claiming that its chart, which pilots rely upon and use to fly their aircraft safely, is "speech" that merits the protection of the First Amendment to the United States Constitution. Jeppesen's chart is a *product,* not speech.

Jeppesen's argument that products deserve First Amendment protection would revolutionize the common law products liability principle, extant throughout the country, which provides that the absence of proper instructions or warnings can make a product defective and subject its manufacturer to strict liability.[64] Instructions and warnings are, of course, conveyed in words; yet the law treats them as part of a commercial product subject to the laws of strict products liability.[65] In a similar fashion, products liability

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[64] At least 38 jurisdictions provide that the absence or inadequacy of instructions or warnings can make a product defective or unreasonably dangerous. See, Annot., 53 A.L.R.3d 239 (1973) and Supplement (1985). Similarly, federal law can require that a product "to be marked with or accompanied by clear and adequate warnings or instructions. . . " See 15 U.S.C. § 2055(a)(2) (Consumer Product Safety Act). California State law imposes similar requirements as to measurements. Business and Professions Code §§ 12601, et seq.

[65] See, e.g., *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529 (D.C. Cir. 1984) (defective label); *Brochu v. Ortho Pharmaceutical Corp.,* 642 F.2d 652; 658 (1st Cir. 1981) (defective warning); *Hubbard-Hall*

law also treats navigational charts as products. *Fluor Corp. v. Jeppesen & Co.*, 170 Cal.App.3d 468, 475 (1985) (review denied); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983) (applying Connecticut law); *Aetna Casualty & Surety Co. v. Jeppesen & Co.*, 642 F.2d 339, 341-342 (9th Cir. 1981) (applying Nevada law). And liability for damages caused by faulty charts has been imposed in innumerable cases. E.g., *Saloomey, supra,* at 679; *Aetna Casualty, supra,* at 342-343; *Reminga v. United States,* 631 F.2d 449 (6th Cir. 1980); *Medley v. United States,* 543 F.Supp. 1211, 1223-1224 (N.D.Cal. 1982); *Allnut v. United States,* 498 F.Supp. 832, 838; (W.D. Mo. 1980); *Murray v. United States,* 327 F.Supp. 835, 841 (D. Utah 1971); *Sullivan v. United States,* 299 F.Supp. 621, 625-626 (N.D. Ala. 1968) aff'd., 411 F.2d 794 (5th Cir. 1969).

The application of products liability law as a form of government regulation in these cases is perfectly consistent with traditional First Amendment theory. Just as conspiracy, *United States v. Cooper,* 606 F.2d 96, 98 (5th Cir. 1979), telephone harassment, *United States v. Lampley,* 573 F.2d 783, 787 (3d Cir. 1978), counseling the filing of false income tax returns *United States v. Freeman,* 761 F.2d 549, 551 (9th Cir. 1985), conveying false information, even in jest, about hijacking a plane, *United States v. Irving,* 509 F.2d 1325 (5th Cir. 1975) and uttering threats upon the President, *Watts v. United States,* 394 U.S. 705 (1969), receive no First Amendment protection merely because they happen to be conducted through words, just as a professional society's ethical rules, *Nat. Soc. of Prof. Engineers v. U.S.,* 435 U.S. 679 (1978), and a trade union's peaceful picketing, *Giboney v. Empire Storage and Ice, Co.,* 336 U.S. 490 (1948), receive no First Amendment protection when they function to restrain trade in violation of the Sherman Act, and just as company newsletters, *S.E.C. v. Suter,* 732 F.2d 1294, 1299 (7th Cir. 1984) and press releases, *S.E.C. v. Texas Gulf Sulphur Co.,* 446 F.2d 1301, 1306 (2d Cir. 1971), receive no First Amendment protection when they violate the Security Exchange Act, so warnings, instructions

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*Chemical Co. v. Silverman,* 340 F.2d 402, 405 (1st Cir. 1965) (defective label); *Midgley v. S.S. Kresge Co.,* 55 Cal.App.3d 67, 74 (1976) (defective assembly instructions).

and products such as Jeppesen's chart should receive no such protection when they include defects that imperil life and limb. For in none of these cases does speech function as part of a marketplace of ideas. *Abrams v. United States,* 250 U.S. 616, 330 (1919) (Holmes, dissenting). Instead it functions as *action,* or advocacy of action, *Yates v. U.S.,* 354 U.S. 298, 321 (1957), or an invitation to immediate and detrimental reliance. Thus, even though accomplished through words, it is properly the subject of government regulation. "A business . . . cannot avoid regulation merely because it engages in publishing." *S.E.C. v. Suter, supra,* 732 F.2d at 1299.

Under Brandeis' classic formulation, the First Amendment prohibits regulation of speech unless the "danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. People of State of California,* 274 U.S., 357, 377 (1927) (concurring opinion). Jeppesen's chart is not an invitation to "full discussion" or "more speech." It is instead simply a device for pilots to use and rely upon to fly their aircraft safely. It is an invitation to action—to immediate and detrimental reliance. As such, it merits no First Amendment protection.

The distinction between true "speech" worthy of First Amendment protection and advocacy of or invitation to action which simply happens to be accomplished through words is aptly illustrated by *Herceg v. Hustler Mag., Inc.,* 565 F.Supp. 802, 803 (S.D. Tex. 1983), cited by Jeppesen in its Petition. In *Herceg* plaintiff claimed that an article entitled "Orgasm of Death," which described the practice of "autoerotic asphyxiation," was a "defective, unreasonably dangerous product" that caused her decedent's death by hanging. The court properly rejected plaintiff's analysis, holding that under the Constitution, the article was protected speech unless the plaintiff could allege and prove, pursuant to *Brandenburg v. Ohio,* 395 U.S. 444, that the "article was 'directed to inciting or producing' the death which occurred

and was 'likely to incite or produce' the death"[66]—in short, that the article was directed to inciting or producing action.[67]

Navigational charts are very different from the magazine article in *Herceg*. Unlike the magazine article, they are published for the *sole purpose* of inciting action in reliance upon them on the part of their users, who are expected to translate into action the symbolized directions embodied in the charts.[68]

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[66] 565 F. Supp. at 805. See, also, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (speech that threatens human injury or incites lawless action may be regulated without offending the First Amendment); *Hess v. Indiana*, 414 U.S. 105, 109 (1973); *Watts v. United States*, 394 U.S. 705 (1969); *Feiner v. New York*, 340, U.S. 315 (1951); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("[F]ree speech would not protect a man in falsely shouting fire in a theater and causing a panic."); *Weirum v. R.K.O. General, Inc.*, 15 Cal.3d 40, 48, 123 Cal.Rptr. 468, 539 P. 2d 36 (1975) ("The First Amendment does not sanction the infliction of physical injury merely because achieved by word rather than act.").

[67] In fact, not only did the article *not* incite readers to attempt the practice described, it expressly warned against it. 565 F. Supp. at 805 fn.3.

[68] Petitioner also cites two state cases, *Cardozo v. True*, 342 So.2d 1053 (Fla.App. 1977) and *Walter v. Bauer*, 439 N.Y.S.2d 821 (Sup.Ct. 1981), both of which are distinguishable. *Cardozo* involved a cookbook containing a recipe for cooking poisonous mushrooms. Plaintiff, who became ill after eating one of the *uncooked* mushrooms, contended that the failure to include in the book a warning on the toxic nature of uncooked mushrooms constituted a breach of warranty. No strict products liability theory was advanced. The Florida Appellate Court rejected the plaintiff's cause of action not on First Amendment grounds but upon its interpretation of Florida's statutory and common law breach of warranty doctrines.

*Walter* involved a plaintiff who was injured while performing an experiment described in defendant's science book. Interpreting New York's products liability law, the court ruled that "plaintiff was not injured by the use of the book for the purpose for which it was designed, i.e., to be read." 439 N.Y.S.2d at 822. There can be no doubt that in the present case the intended purpose of Jeppesen's chart was that it be

### B. The Fact That Jeppesen's Chart Reproduces an FAA Regulation Is Irrelevant

Jeppesen again misframes the issue when it asks the Court to declare that "the First Amendment protects the accurate publication of laws and government regulations."

The "regulation" at issue here is not an ordinary law or regulation which sets the limit of legal conduct. It is, instead a precise set of directions which pilots are expected to follow and upon which they must rely for the safety of their aircraft. The purpose in publishing these directions in the Federal Register is to impose upon pilots the legal requirement of following them, subjecting them to disciplinary action for failure to do so. See 14 C.F.R. § 91.116(a). The same end could have been accomplished by simply enacting a general statute or regulation requiring pilots to follow the approach procedures designed and promulgated by the government.[69]

If a navigational chart designed and published by the Government is defective, the Government itself can be held liable. *Reminga v. United States, supra*, 631 F.2d 449, 452; *De Bardeleben v. United States, supra*, 451 F.2d 140, 149; *Medley v. Unites States, supra*, 543 F. Supp. 1211, 1223; *Allnut v. United States, supra*, 498 F. Supp. 832, 838; *Murray v. United States, supra*, 327 F. Supp. 835, 841; *Sullivan v. United States, supra*, 299 F. Supp. 621, 625-626.[70] In short, Jeppesen seeks an immu-

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followed by pilots while flying their aircraft. Furthermore, *Walter* was nothing more than a ruling on a motion by a trial judge, and as such carries no precedential force even in the State of New York.

[69] This sort of approach was employed, for example, in the case of the government regulation requiring pilots to obey verbal clearances and directions issued by air traffic controllers, 14 C.F.R. §§ 91.75, 91.115, and in the case of the government regulation requiring pilots of approaching and departing aircraft to follow airport traffic patterns established by the FAA. 14 C.F.R. § 91.89.

[70] Similarly, the government can be held liable for directions negligently given by an FAA air traffic controller *United Airlines, Inc. v. Wiener*, 335 F.2d 379, 396 (9th Cir. 1964); *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F.2d 62, 79 (D.C. Cir. 1955) and for negligent

nity greater than that afforded the Government itself.[71] Furthermore, Jeppesen did not simply translate a government regulation. It presented a chart with the warranty that it provided "EVERYTHING you need for a smooth transition from enroute to approach segment of your flight." Jeppesen was free to include information other than that required in FAA regulations and indeed did so. For example, Jeppesen's chart included communication frequencies, airport information, minimum off-route altitudes, representations of land and water terrain and representations of mountain peaks along with their corresponding elevations, none of which was included in the government-designed approach procedure. In addition, Jeppesen was free to include and should have included *warnings* of defects in the FAA approach procedure. The absence of a warning constitutes a defect in the chart wholly separate and apart from defects in the approach procedure itself.[72] In other words, the absence of a warning was a defect stemming from Jeppesen for which it is liable even though it could not alter the approach procedure.[73]

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construction of an airport traffic pattern *Foss v. U.S.*, 623 F.2d 104, 105 (9th Cir. 1980), even though (indeed, perhaps especially because) pilots are required to follow them. (See footnote 69.)

[71] This argument by Jeppesen suggests that Jeppesen's own liability is derivative of the Government's. In fact, the reverse is true: Under the Federal Tort Claims Act, the Government is subject to liability only "in the same manner and to the same extent as a *private individual* under like circumstances. . . ." 28 U.S.C.A. § 2674 (emphasis added). Similarly, under the Suits in Admiralty Act, an action against the Government can be maintained only in cases where "if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained. . . ." 46 U.S.C. § 742.

[72] In *Medley v. U.S.*, 543 F.Supp. 1211, 1221 (N.D.Ca. 1982), the Government was held liable under the Federal Tort Claims Act for failing to place a warning on an aviation chart.

[73] In many cases a product has been found defective because of an inadequate label or warning, *even though* the label or warning complied with government requirements. See, e.g., *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541 (D.C.Cir. 1984) (toxic chemical label

### C. Imposing Liability for Injuries Caused by Defective Navigational Charts Does Not Offend the First Amendment

Imposition by the states of liability for injuries caused by defective navigational charts constitutes nothing more than reasonable state regulation of commercial products. Jeppesen's attempt to analyze the First Amendment protection due such charts by analogy to libel and defamation cases is misconceived. A more appropriate analogy exists in this Court's analysis of the First Amendment protection afforded commercial speech.

Jeppesen in effect argues that the same First Amendment considerations that are present in the libel cases on *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) and its progeny are present here. Each of these cases, however, involved matters of public concern and represented a balance between the state interest in compensating private individuals for injury to reputation and the First Amendment interest of insuring freedom of expression on public questions and debate on public issues that is uninhibited, robust and wide open. *Dun & Bradstreet v. Greenmoss Builders,* 105 S.Ct. 2939 (1985).

*Dun & Bradstreet* involved a credit report issued to five subscribers which falsely described a construction contractor's financial condition. The contractor brought a defamation action. This Court held that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of "public concern". 105 S.Ct. at 2946. In reaching its holding, the Court pointed out that the First Amendment interests there involved were similar to those involved in "commercial speech." 105 S.Ct. at 2947. The same is true here.

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defective even though it complied with government regulations); *Brochu v. Ortho Pharmaceutical Corp.,* 642 F.2d 652, 658 (1st Cir. 1981) (warning defective even though part of FDA-approved "uniform" label); *Hubbard-Hall Chemical Co. v. Silverman,* 340 F.2d 402, 405 (1st. Cir. 1965) (labels inadequate even though approved by Department of Agriculture).

Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas v. Public Service Commission,* 447 U.S. 557, 561 (1980). The term has been applied almost exclusively to speech which advertises or promotes the sale of a commodity or service. See, e.g., *In the Matter of R.M.J.,* 455 U.S. 191 (1982); *Central Hudson Gas, supra,* 447 U.S. 557; *Friedman v. Rogers,* 440 U.S. 1 (1979); *Virginia Pharmacy Board v. Virginia Consumer Counsel,* 425 U.S. 748 (1976). In the present case, Jeppesen's chart does not promote the sale of a commodity but is instead *itself* the commodity. Nonetheless, like the credit report in *Dun & Bradstreet,* it possesses many of the same First Amendment characteristics as commercial speech.

Thus, Jeppesen's copyrighted aviation chart is "speech solely in the individual interest of the speaker and its specific business audience." *Dun & Bradstreet, supra,* 105 S.Ct. at 2947. This particular interest warrants no special protection when—as in this case—the speech is defective and as a result causes not merely damage to a business reputation but death and destruction. Furthermore, as demonstrated above, Jeppesen's chart is a product and not a part of the "marketplace of ideas:"

> [I]t cannot be said that the [navigational chart] involves any 'strong interest in the free flow of commercial information'. There is simply no credible argument that this type of [navigational chart] requires special protection to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open.'

*Dun & Bradstreet, supra,* 105 S.Ct. at 2947 (citations omitted).[74]

Finally, the type of spech involved here is more resilient to state regulation than other speech:

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[74] A similar point was made in *S.E.C. v. Texas Gulf Sulphur Co.,* 446 F.2d 1301 (1971), in which the court found that a company's misleading press release violated the Security Exchange Act of 1934. The court rejected the company's First Amendment defense, noting: "[T]he First Amendment deals with the free exchange of ideas and not with commercial 'factual' speech." 446 F.2d at 1306.

> In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Arguably, the [chart] here was also more objectively verifiable than speech deserving of greater protection. In any case, the market provides a powerful incentive to a [chartmaker] to be accurate, since [a defective aviation chart] is of no use to [pilots]. Thus, any incremental "chilling" effect of [product liability] suits would be of decreased significance.

*Dun & Bradstreet, supra*, 105 S.Ct. at 2947 (citations and footnote omitted).

## III

## PETITIONER HAS ALREADY MADE PAYMENT IN FULL OF THE AMOUNT NECESSARY TO SATISFY AND SETTLE ITS OBLIGATION ON THE JUDGMENT

This Court should not grant discretionary review on certiorari of a judgment that petitioner has satisfied in full, thereby rendering the case moot. Even with respect to the statutory right of appeal, payment of the judgment by the insurance carrier of the defendant's employer places the appellate court "without power to grant relief from the order appealed from, and the case is moot." *Phillips v. Cheltenham Township*, 575 F.2d 72, 73 (3rd Cir. 1978). *Accord, Banger v. Philadelphia Electric Co.*, 419 F.2d 1322 (3rd Cir. 1969) (appeal dismissed as moot after payment to the clerk of penalty on attorney); *Taylor v. United States*, 410 F.2d 392 (5th Cir. 1969) (appeal from contempt fine mooted by payment); *Lesmark, Inc. v. Pryce*, 334 F.2d 942, 943 (D.C. Cir. 1964) (satisfaction of plaintiffs' money judgment requires dismissal of appeal); *Bingham v. Yingling Chevrolet Co.*, 297 F.2d 341, 342 (10th Cir. 1961) (debtor's payment to sole creditor moots debtor's appeal from dismissal of bankruptcy).

Because petitioner has paid respondents, including individual heirs in the wrongful death actions, there is no effective judicial mechanism for restoring the parties to the status quo even in the event this Court reverses the judgment. "[W]here events have

occurred which preclude granting effectual relief to an appellant, an appellate court will dismiss the appeal. [Citation] The payment of a judgment under circumstances where repayment or restitution could not be obtained in event of a reversal bars an appeal." *Leader Clothing Co. v. Fidelity & Casualty Co. of New York*, 227 F.2d 574, 576 (10th Cir. 1955). Even where the appeal is taken pursuant to statutory right, compliance with an order that includes the payment of cash constitutes "action of a character which cannot be reversed by the court of appeals," and where the Court of Appeals becomes "powerless to grant the relief requested by the appellant . . . the appeal will be dismissed as moot." *Thibaut v. Ourso*, 705 F.2d 118, 120-121 (5th Cir. 1983) ("nor can we simply take the $100,000 back from McNutt . . . .").

Petitioner's reliance upon *Cahill v. New York, New Haven & Hartford R. Railroad Co.*, 351 U.S. 183 (1956), is misplaced. The judgment had been satisfied only because the appellant's application to the District Court for stay of execution had been denied and defendant had informed plaintiff that it intended to pursue its appellate remedies notwithstanding payment of the judgment. In dissent, four members of this Court suggested that further appellate review would be appropriate only if judgment was paid "under duress . . . before this Court takes the drastic action of trying to make a plaintiff pay back money that he has received under an order of this court." 351 U.S. at 190-191. By contrast, execution in the instant case was stayed by agreement of the parties. Petitioner's insurance carriers made *voluntary* payment only after the decision of the Court of Appeals and, except for the final 9% of the total recovery, without any notice to respondents that petitioner intended to seek review in this Court.

Although *County of Dakota v. Glidden*, 113 U.S. 222, 224 (1885) does state that a defendant can pay a money judgment and obtain a reversal on appeal, that statement was dictum to distinguish the circumstance there presented of a "new agreement, on sufficient consideration," which had the "effect of extinguishing the judgment now sought to be reversed," rendering "fruitless" the review of error underlying the judgment. 113 U.S. at 225. Consequently the writ of error was dismissed.

The *County of Dakota* decision did not in any way limit this Court's previous holdings that the payment of a tax in full compelled dismissal of a proceeding in this Court to review the validity of the tax. *County of San Mateo v. Southern Pacific Railroad Co.*, 116 U.S. 138 (1885). "[W]hen pending a suit concerning the validity of the assessment of a tax, the tax was paid [citation] or the amount of the tax was tendered, and deposited in a bank, which by statute had the same effect as actual payment and receipt of the money . . . appeals have been dismissed by this court . . . ." *Mills v. Green*, 159 U.S. 651, 654 (1895).

The circumstances of payment are set forth in the declaration of counsel for plaintiffs, Albert R. Abramson, Esq., Appendix D.[75] The payment of the judgment by Jeppesen's insurance carrier was not made at the request of the plaintiffs, nor was it made with any prior indication by Jeppesen that it would reserve its right to appeal until the last 9% was tendered. Certainly plaintiffs did not agree that Jeppesen could obtain further review of the judgment after payment. Finally, the last payment did not fully satisfy plaintiff's claims for interest or for costs and therefore was not satisfaction in full but rather a settlement which does bar further appellate review. *County of Dakota v. Glidden*, 113 U.S. 222, 225 (1885).

## IV

## THE JUDGMENT IS SUPPORTED BY THEORIES OF NEGLIGENCE AND BREACH OF WARRANTY, WHICH ARE NOT THE SUBJECT OF FIRST AMENDMENT ATTACK.

Respondents sought recovery from petitioner not only on the basis of products liability but also for the petitioner's negligence and breach of warranty. The case was submitted to the jury on all three theories and the jury returned a general verdict in favor of respondents and against petitioner. Thus, even if Jeppesen's First Amendment challenge to products liability had merit, the judg-

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[75] Facts not appearing of record showing payment of judgment "may be proved by extrinsic evidence." *Mills v. Green*, 159 U.S. 651, 653 (1895).

ment would nevertheless have to be affirmed on the unchallenged grounds of negligence and breach of warranty. "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957).[76]

Moreover, in this diversity action, this Court should follow state law in construing verdicts, so that a defect in one theory submitted to the jury will not require reversal of a general verdict where another error-free theory was also submitted to the jury and was supported by sufficient evidence. *Adkins v. Ford Motor Co.*, 446 F.2d 1105, 1108 (6th Cir. 1971):

> Where jurisdiction is founded upon diversity of citizenship and state-created rights are sought to be enforced, this Court has consistently construed a general verdict as the state courts would.[77]

In California "[a] general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action .... Where a case is tried on alternate theories of liability ... the general verdict implies findings in favor of the prevailing party on all issues submitted to the jury." *Codekas v. Dyna-Lift Co.*, 48 Cal.App.3d 20, 24-25; 121 Cal.Rptr. 121 (1975); *accord, Berger v. Southern Pac. Co.*, 144 Cal.App.2d 1, 5 (1956).

Respondents are entitled to have their general verdict affirmed under the negligence and warranty theories to obtain the same outcome that they would have obtained had this case been tried in

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[76] "Where more than one theory of recovery has been submitted to the jury in a civil case, and where on appeal it is claimed that as to one of the theories there was a lack of evidential support or an error of law in submitting the theory to the jury, the reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error." *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980).

[77] Accord, *Coal Resources, Inc. v. Gulf & Western Industries*, 756 F.2d 443, 448-449 (6th Cir. 1985); *DeWitt v. Brown*, 669 F.2d 516, 523 (8th Cir. 1982); *Gold v. National Savings Bank*, 641 F.2d 430, 434 (6th Cir. 1981); *Keet v. Service Machine Co., Inc.* 472 F.2d 138, 140 (6th Cir. 1972).

state court. *Guarantee Trust Co. v. York,* 326 U.S. 99, 108 (1945). To accomplish "discouragement of forum-shopping and avoidance of inequitable administration of the laws"[78] petitioner should not be permitted to lie in wait with a First Amendment challenge which it discloses for the first time only on appeal, when California appellate courts would nevertheless affirm the judgment.

## CONCLUSION

For the foregoing reasons, respondents Barbara Brocklesby, et al, urge this Court to deny Jeppesen's petition for certiorari.

Dated: December 30, 1985

Respectfully submitted,

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[78] *Hanna v. Plumer,* 380 U.S. 460, 468 (1965).

Par 13, 14

34-

DEPARTMENT OF TRANSPORTATION - FEDERAL AVIATION ADMINISTRATION
LOS/ITS STANDARD INSTRUMENT APPROACH PROCEDURE
FLIGHT STANDARDS SERVICE - FAR PART 97.25

| TERMINAL ROUTES | FROM | TO | VIA |
|---|---|---|---|
| | CDB VORTAC | 19.5 DME CDB VORTAC/ CDB LOC (BC) | CDB R-141 & LOC (BC) |
| | 40 DME CDB VORTAC/ CDB LOC (BC) (IAF) | 19.5 DME CDB VORTAC/ CDB LOC (BC) (HOPT) | I-CDB LOC (BC) |

1A. PROCEDURE TURN South SIDE OF CRS 142° OUTBND 322° INBN
1B.
2. FAF 9.5 DME FINAL APPROACH COURSE 322°
3. Minimum altitude over: 19.5 DME 3500'; 9.5 DME 1
6. MSA 000°-090° 6000'; 090°-180° 6800'; 180°-2

DAY AND NIGH

TAKE OFF ► % Standard

| CAT. ► | A | | | B | | |
|---|---|---|---|---|---|---|
| S-32 | MDA 400 | VIS 3/4 | HAT 310 | MDA 400 | VIS 3/4 | HAT |
| * Circling 14, 26 | MDA 560 | VIS 1 | HAA 462 | MDA 560 | VIS 1 | HAA |
| ** Circling 8 | MDA 800 | VIS 2 | HAA 702 | MDA 800 | VIS 2 | HAA |

Procedural Data Notes

1. This procedure not authorized for aircraft not equip
localizer and DME not co-located. DME information from
2. * Circling not authorized West of rwy 14/32 except w
3. ** Night circling rwy 8 not authorized.
4. % Southbound (026° thru 235°) IFR departures must co
5. Air Carrier will not reduce take-off visibility due
6. Approach reference lights, rwy 32, not to be constru
7. % Take off rwy 26, 800-2.

| CITY AND STATE | AIRPORT AND ELEVATION |
|---|---|

arings, headings, courses and radials are magnetic. Elevations and altitudes are in feet, MSL, cept HAT, HAA, and RA. Altitudes are minimum altitudes unless otherwise indicated. Ceilgs are in feet above airport elevation. Distances are in nautical miles unless otherwise indicad, except visibilities which are in statute miles or in feet RVR.

| ALTITUDE | MISSED APPROACH |
|---|---|
| | MAP<br>4.5 DME on LOC (BC) |
| 7000' | Climb to 3000' on NW crs. ILS localizer within 15 miles. |
| 3500' | **Additional Flight Data**<br>1. 1100' Mt. Simeon 2.4 mi. West of airport.<br>2. 5784' Frosty Peak 7 mi. South of airport.<br>3. HIRL rwys 8/26 and 14/32.<br>4. VASI & REIL rwy 32. |

D 3500 FT. WITHIN 10 MI. OF 19.5 DME

DISTANCE FAF TO MAP

900'; 7.5 DME 1160'.
270° 6800'; 270°-360° 2800'

T MINIMUMS

| | | | | ALTERNATE | | Standard |
|---|---|---|---|---|---|---|
| | C | | | D | | |
| 310 | MDA 400 | VIS 3/4 | HAT 310 | MDA 400 | VIS 1 | HAT 310 |
| 462 | MDA 560 | VIS 1½ | HAA 462 | MDA 660 | VIS 2 | HAA 562 |
| 702 | MDA 800 | VIS 2 | HAA 702 | MDA 1400 | VIS 2 | HAA 1302 |

ed for simultaneous reception of VOR/DME and ILS.
CDB VORTAC.
en landing rwy 8.

mply with published Cold Bay SIDs.
o local conditions runway 26.
d as lead-in lights.

| ACILITY IDENT. | PROC. NO. AMDT. NO. – EFFECTIVE DATE | SUP. AMDT. DATED |
|---|---|---|
| DB (VORTAC) | LOC (BC)/DME Rwy 32, Original | NONE |

Jeppesen Approach Chart — NOV 12-71 (11-2)

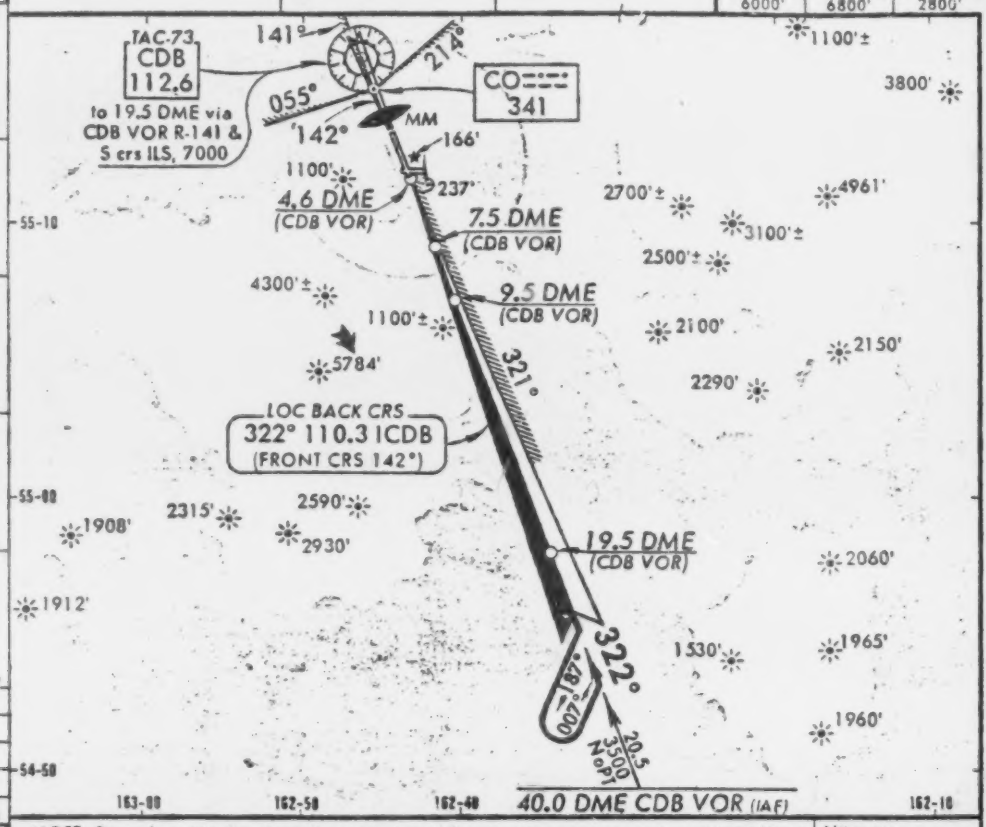
# COLD BAY, ALASKA

COLD BAY Radio 122.1 126.7 2861 3023.5G
5631

Apt. Elev 98'
Var 17°E

COLD BAY
LOC (BACK CRS) DME Rwy 32
LOC 110.3 ICDB

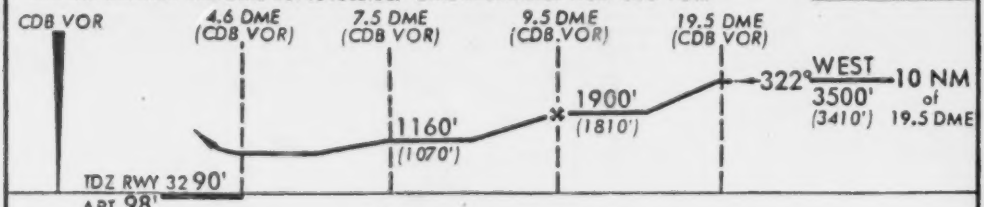
MSA
360° - 090° 6000'
090° - 270° 6800'
270° - 360° 2800'




NOTE: Procedure NA for aircraft not equipped for simultaneous reception of VOR/DME and ILS. Localizer and DME not co-located. DME information from CDB VOR.

Altimeter Setting In INCHES

Scale




PULL UP to 3000 feet on NORTH course ILS within 15 NM.

## STRAIGHT-IN LANDING RWY 32

MDA 400' (310')

| | HIRL out |
|---|---|
| A, B, C | 3/4 — 1 |
| D | 1 |
| All Non Skd | MDA 440' (350') — 1 |

## CIRCLE-TO-LAND

| | To Rwy 14 & 26 NA West of Rwy 14-32 MDA | To Rwy 8 MDA DAY | To Rwy 8 NIGHT |
|---|---|---|---|
| A, B | 560' (462') -1 | 800' (702') -2 | NA |
| C | 560' (462') -1 1/2 | | |
| D | 660' (562') -2 | 1400' (1302') -2 | NA |
| 3 Eng Jet | Non-Skd 760' (662') -2 | Non-Skd 1400' (1302') -2 | NA |

| Gnd speed - Kts | 60 | 80 | 100 | 120 | 140 | 160 |
|---|---|---|---|---|---|---|
| MAP at 4.6 DME | | | | | | |

CHANGES: Ground control deleted.

Plan Scale 7.5 NM Per Inch

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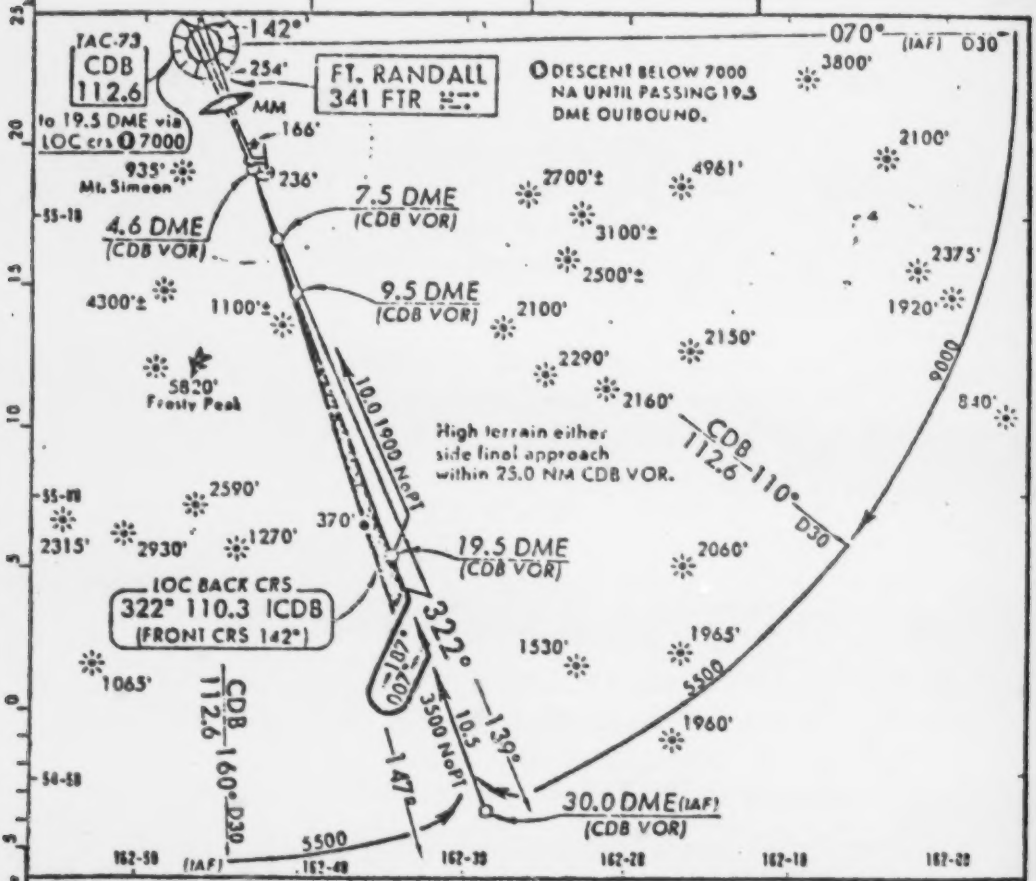
Jeppesen Approach Chart — JUL 12 74 — (11-2)

# COLD BAY, ALASKA

COLD BAY

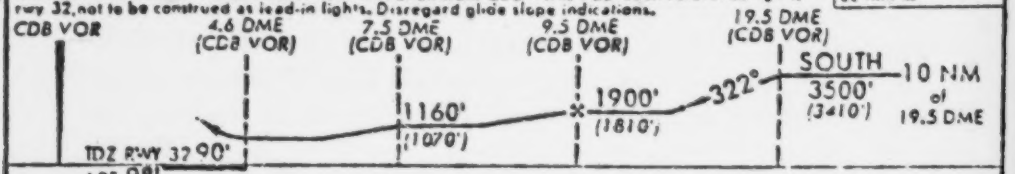
COLD BAY Radio 122.2 126.7 2861 3023.5G
5631

Apt. Elev 98'
Eff Jul 18 LOC DME (BACK CRS) Rwy 32
Var 17°E
IOC 110.3 ICDB




NOTE: Procedure NA for aircraft not equipped for simultaneous reception of VOR-DME and ILS. Localizer and DME not co-located. DME information from CDB VOR. Approach reference lights, rwy 32, not to be construed as lead-in lights. Disregard glide slope indications.

All meter Setting in INCHES




PULL UP: Climb to 3000 feet on NORTH WEST course ICDB ILS localizer within 15 NM.

| | STRAIGHT-IN LANDING RWY 32 | | CIRCLE-TO-LAND | | |
|---|---|---|---|---|---|
| | MDA 400' (310') | | To Rwy 14 & 26 NA West of Rwy 14-32 | To Rwy 8 | |
| | | HIRL out | MDA | MDA DAY | NIGHT |
| A | 3/4 | 1 | A | 560' (462') -1 | 800' (702') -2 | NA |
| B | | | B | | | |
| C | | | C | 560' (462') -1/2 | | |
| D | 1 | | D & J Eng Jet | 660' (562') -2 | 1400' (1302') -2 | NA |
| All Non Std | MDA 440' (350') 1 | | | Non-Std 760' (662') -2 | Non-Std 1400' (1302') -2 | |

| | | | | | | |
|---|---|---|---|---|---|---|
| 7.5 DME | Knots | 80 | 100 | 120 | 140 | 160 |
| MAP at 4.6 DME | Time | | | | | |
| to MDA @ 760' | Rate | 320 | 400 | 480 | 560 | 640 |

CHANGES: MSA deleted, terminal routes, CO RNG to FTR NDB. Plan Scale 2.5 NM Per Inch

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**Appendix D**

In the Supreme Court
of the
United States

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October Term, 1985

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Jeppesen & Company,
Petitioner,

vs.

Barbara A. Brocklesby, et al.,
and the United States of America,
Respondents.

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## DECLARATION OF ATTORNEY ALBERT R. ABRAMSON, ESQ.

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I, ALBERT R. ABRAMSON, declare:

That I am lead counsel for plaintiffs and respondents Barbara A. Brocklesby, et al., and was responsible for the receipt of checks transmitted by the various insurance carriers of Jeppesen & Company and the disbursement of the funds to plaintiffs.

Before filing its Petition for Certiorari Jeppesen's insurers paid off the judgment in four separate payments. Not until the last payment, amounting to only 9% of the judgment, did Jeppesen's attorneys (or anyone else) suggest that Jeppesen would seek further review. Nor did plaintiffs at any time, by acceptance of the last payment or otherwise, consent to Jeppesen seeking further review.

The chronology of these payments is as follows:

On June 20, 1985, a draft in the amount of $6,120,903.32 was transmitted to your declarant as the total amount of coverage of Mission Insurance Company under its primary policy, plus interest and costs. The letter of transmittal by attorney James B. Werner described the payment as "the total amount of coverage plus interest and costs" and neither the letter nor the draft

reflected any reservation of Jeppesen's right to obtain further appellate review.

On June 21, 1985 I received a letter from attorney Charles A. Adamek, of Lord, Bissell & Brook, on behalf of the London Excess Insurers which stated:

> If the court [Ninth Circuit Court of Appeals] still has not ruled as of that date [July 26, 1985], Excess Insurers will review their position in this matter and determine at that time whether they desire to continue the litigation beyond that point.

This letter clearly implies that it was the position of the excess insurers that payment of the judgment would terminate the litigation, and this letter was so understood by your declarant.

On August 13, 1985, attorney Terry W. Backus of Lord, Bissell & Brook, wrote a letter to your declarant specifying the amount of the outstanding balance on the judgment including interest and specifying the manner in which various carriers would pay the outstanding balance without any mention that further appellate review would be sought after payment.

On August 2, 1985 the Ninth Circuit Court of Appeals filed its amended opinion in response to Jeppesen's petition for rehearing and rehearing en banc.

On August 15, 1985, Charles A. Adamek transmitted "an amount which we believe to be the final sum due and owing on behalf of those Underwriters at Lloyd's and London companies whom we represent in this matter," without any mention of seeking further appellate review.

The remaining payment, for 9% of the judgment (or 15% of the excess layer over Mission Insurance Company's primary coverage), was made by Midland Insurance Company in the amount of $1,434,197.63 on September 3, 1985. The draft, made payable to your declarant as trustee for all plaintiffs, stated "$1,434,197.63 for indemnity settlement of all claims Barbara A. Brocklesby, et al."

Plaintiffs never agreed to authorize further appellate review after payments were made on the judgment. If such a condition had been imposed, plaintiffs would not have accepted the money piecemeal nor would they have given partial satisfactions of judgment, but would have demanded complete satisfaction in a single lump sum, allowing interest to accrue at 10.25% until such single lump sum was paid. Plaintiffs accepted partial, piecemeal payments only because they believed such payments were final and granted them the unfettered right to spend the money as they chose without threat of any possible request for repayment. This belief was consistent with representations by counsel for Mission Insurance and Lloyd's that their payments were "total" and "final," indicating their intent to abandon the appeal and not to pursue the case further.

Only on August 29, in connection with the final payment of $1,434,197.63 by Midland Insurance did counsel for petitioner propose for the first time a satisfaction of judgment containing a "without prejudice" clause which your declarant rejected out of hand. On August 30, 1985 in response to my objection, counsel for petitioner then submitted a "complete and full satisfaction of said judgment" for plaintiffs' acknowledgment, which was executed and filed in the District Court. Petitioner's letter of transmittal expressed petitioner's unilateral position that payment would not prejudice petitioner's right "to seek further review and reversal of this judgment and reimbursement of the monies paid in satisfaction of it."

Finally, the last tender of payment was insufficient and was accepted by plaintiffs only in settlement as stated on the draft. When first tendered your declarant had no authority from co-counsel to accept it. Such authority was obtained three days later after additional interest accrued on the judgment in the amount of $1,201, which counsel for petitioner refused to pay. In addition, the parties had an agreement that, rather than require a bond, Jeppesen would pay plaintiffs one-half of each annual premium cost that would otherwise have become due during pendency of the appeal. At the time the last payment was tendered by Midland Insurance, one-half of the third annual renewal premium, amounting to $11,500, had become due and payable.

Jeppesen refused to make the payment. Plaintiffs abandoned their claims for interest and bond premiums, and accepted final payment in settlement without agreeing to any reservation by petitioner of a right for further appellate review, only to bring an end to this protracted litigation.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on December 30, 1985.

/s/ ALBERT R. ABRAMSON
ALBERT R. ABRAMSON

Supreme Court, U.S.
FILED
JAN 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-742

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

JEPPESEN & COMPANY,
*Petitioners,*

vs.

BARBARA A. BROCKLESBY, ET AL.,
*Respondents.*

## REPLY BRIEF

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(202) 331-4685

Dated: January 13, 1986

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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# PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jeppesen & Company ("Jeppesen") respectfully makes the following points in reply to Respondents' opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

(1) Respondents do not dispute the essential facts underlying the Petition: (1) the Government was solely responsible for designing, flight testing and promulgating the instrument approach procedure at issue in this case; (2) this procedure was a government regulation with the force and effect of law; (3) Jeppesen accurately depicted this regulatory procedure on its approach chart; and (4) the jury was instructed that it must find Jeppesen liable, without fault, if the Government's procedure was defective and a proximate cause of the accident. This is exactly what the jury found.[1] These uncontroverted facts are all that are

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[1] In a declaration filed after the trial and made a part of the record, juror Estelle N. Begley stated:

> In my opinion (and, I believe in the opinion of all the other jurors), the FAA negligently designed, approved and published the instrument approach procedure for the Cold Bay airport because it failed to incorporate an 8,000 ft. minimum reception altitude requirement in its 8260-5 form. The entire jury believed that the failure to include an 8,000 ft. minimum reception altitude in the FAA 8260-5 form rendered the instrument approach procedure defective and that this was the primary proximate cause of the crash.
>
> During the course of our deliberations, we carefully considered the question of whether the Jeppesen chart correctly and accurately portrayed the instrument approach procedure contained in the FAA Form 8260-5. I believe that there was unanimous agreement among the jurors that the content, manner and format of the Jeppesen chart was proper in all respects, and that there was nothing about the chart which changed, altered, distorted, or failed to include any of the information or specifications contained in the FAA Form 8260-5. We decided that the FAA had the sole authority over the data published in the FAA Form 8260-5 and that Jeppesen & Co. was required to

necessary for this Court to decide whether to consider on the merits the question presented by this Petition: "Does the First Amendment permit a private citizen to be held liable without fault for accurately publishing a law of the United States?"

(2) The Government is responsible for designing and promulgating instrument approach procedures for every civilian airport in the United States.[2] Jeppesen's charts, which communicate these regulations in an understandable form to those who are required to obey them, are used by every major air carrier in this country.[3] The life of every American who flies on an airliner depends upon the pilot's understanding and compliance with applicable instrument approach procedures. Contrary to Respondents' position, the information communicated by Jeppesen's chart, which was completely accurate and widely distributed, constitutes speech on "matters of public concern" at the "heart of the First Amendment's protection." *Dun & Bradstreet, Inc. v. Greenmoss Buildings, Inc.*, 472 U.S. ____, 86 L. Ed. 2d 593, 602 (1985).

(3) Respondents' assertion that Jeppesen is not entitled to the protection of the First Amendment because its charts "incite action" is specious. Instrument approach procedures are government regulations which pilots are required by law to follow, whether or not Jeppesen republishes them. The Government commands action; Jeppesen merely communicates information.

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confine its graphic depiction to the precise information contained in the 8260-5 form. . . .

Although I am of the opinion that the Jeppesen chart accurately depicted the information contained in the FAA Form 8260-5, I felt it was necessary to return a verdict against Jeppesen according to the instructions.

Excerpt of Record 322:12-323:20. *Accord* declarations of jurors Elsie Rodgers and Mary K. Purser. Excerpt of Record 315-21.

[2] F.A.R. § 97.20.

[3] RT 2805:8-12.

(4) Respondents argue that because Jeppesen's chart is a product, it is not speech.[4] The Petition asks the Court to declare that the accurate publication of a regulation is a constitutionally protected activity, whether or not the medium of communication is a product.

(5) If the Court agrees that a private citizen cannot be held liable without fault for accurately publishing a government regulation, then the general verdict must be reversed. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962).[5]

(6) Jeppesen's satisfaction of the judgment in this action does not moot this appeal because:

> (A) A party may satisfy a judgment in order to avoid paying further post-judgment interest, expressly reserving its right to seek a reversal of the judgment and reimbursement. *United States v. 3,317.39 Acres of Land*, 481 F.2d 417, 419-20 (8th Cir. 1973).[6] In this case, interest on the judgment of $12,785,580.81 was accruing at the rate of 10.25% per year, compounded annually, or approximately $4,300.00 per day as of June 1985.

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[4] Respondents' Brief at 16. This position is implicit in the Ninth Circuit's decision. See Appendix B at 14-15.

[5] As the court below recognized, this rule is equally applicable in diversity actions. Appendix B at 8; *see generally Bone v. Refco Inc.*, 774 F.2d 235, 242 (8th Cir. 1985); *Ouimette v. E.F. Hutton & Co., Inc.*, 740 F.2d 72, 74 n.2 (1st Cir. 1984); *Collis v. Ashland Oil & Refining Co.*, 722 F.2d 625, 627 (10th Cir. 1983); *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1098-99 (11th Cir. 1983); *Ely v. Blevins*, 706 F.2d 479, 480 (4th Cir. 1983); *King v. Ford Motor Co.*, 597 F.2d 436, 439 (5th Cir. 1979). The Sixth Circuit rule relied upon by Respondents thus appears to be an anomaly.

[6] *See generally United States v. Hougham*, 364 U.S. 310, 312 (1960); *County of Dakota v. Glidden*, 113 U.S. 222, 224 (1885); *Doe v. Brookline School Comm.*, 722 F.2d 910, 914-15 (1st Cir. 1983); *McGowan v. King, Inc.*, 616 F.2d 745, 747 (5th Cir. 1980); 13A Wright Miller & Cooper *Federal Practice and Procedure* § 3533.2 p. 248 (2d ed. 1984), and cases cited therein.

(B) Jeppesen publishes thousands of charts containing the Government's procedures, and the issue raised by this Petition will undoubtedly arise in future cases unless this Court declares that the accurate dissemination of regulations is protected by the First Amendment. *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 153 n.5 (1983).

(C) The Court's decision will necessarily have a direct effect upon Jeppesen's claim for indemnity against the Government. *See Bank of Marin v. England*, 385 U.S. 99, 100-101 (1966).

Respectfully submitted,

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